In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 3993

FREDERICK L. DENMAN,
Plaintiff in Error

vs.

CHARLES RICHARDSON,
Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

BRIEF OF DEFENDANT IN ERROR

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This action was originally commenced in the Superior Court of Pierce County, Washington, by Frederick L. Denman, and Frederick L. Denman as agent and attorney in fact for Charles A. Miller, A. H. Denman, Percey E. Radley, J. H. Wrentmore,

W. Boyd Shannon, J. Hunter Ramsey, W. Archibald, F. C. Hewson and Thomas Larsen, as plaintiffs versus Charles Richardson as defendant. In the original complaint it was alleged that the Pacific Cold Storage Company was a corporation organized under the laws of the State of Washington, with a capital stock of $1,000,000, divided into 10,000 shares of the par value of $100 each, and "that the following named parties are now, and at all times herein mentioned were the lawful owners of the number of shares set opposite their respective names, to-wit:

Charls A. Miller	798 shares
A. H. Denman	40 shares
Percey E. Radley and J. H. Wrentmore	125 shares
W. Boyd Shannon	50 shares
J. Hunter Ramsey	40 shares
W. Archibald	186 shares
F. C. Hewson	1 share
Thomas Larsen	25 shares
Frederick L. Denman	60 shares

(Trans. p. 5.)

The cause was removed to the United States District Court for the Western District of Washington, Southern Division on the ground of diversity of citizenship. Subsequently A. H. Denman, Percy E. Radley, J. H. Wrentmore, W. Boyd Shannon,

J. Hunter Ramsey, W. Archibald, F. C. Hewson and Thomas Larsen were dismissed by the plaintiff. Seven amended complaints were filed by the plaintiff. The defendant demurred to each complaint upon the grounds: (1) That there is a defect of parties plaintiff; (2) that there is a defect of parties defendant; (3) that several causes of action have been improperly united; (4) that the complaint does not state facts sufficient to constitute a cause of action; (5) that the action was not commenced within the time limited by law. (Trans. p. 27.)

Finally the plaintiff filed the seventh amended complaint, which is the complaint upon which the action was tried in the court below. (Trans. p. 14.) To each cause of action the defendant filed demurrers upon the grounds above stated. The court will observe that the plaintiffs named in the original complaint were all withdrawn with the exception of Frederick L. Denman, who bases his right of recovery by reason of his ownership of sixty shares of the capital stock of the Pacific Cold Storage Company and by reason of his acquisition, after the commencement of said action, of the 798 shares of stock in said company owned at the time of the commencement of the action by Charles A. Miller.

In the seventh amended complaint, the plaintiff sets forth four causes of action. For convenience, plaintiff in error will be referred to as the "plaintiff," and the defendant in error will be referred to as the "defendant."

In the first and third causes of action the plaintiff claims a right to recover based upon his ownership of sixty shares of stock in the Pacific Cold Storage Company since the month of April, 1912. As to the second and fourth causes of action, the plaintiff bases his claim upon an assignment by Charles A. Miller, the holder of 798 shares of the capital stock of the Pacific Cold Storage Company. The assignment of Miller to the plaintiff is dated September 10, 1919, subsequent to the commencement of this action.

(a) As to the first cause of action, plaintiff alleges that "in each year commencing with the year 1912 and ending with the year 1918, the defendant, without authority from said corporation, its trustees or its stockholders, and while acting as trustee and president, wrongfully and unlawfully misappropriated and converted to his own use from said accumulated funds and undivided profits an amount equal to 2½ per cent of the amount paid to said

stockholders as dividends," and then sets forth that such dividends and the 2½ per cent of the dividends were paid in the month of January of each year from the year 1912 to 1918 inclusive. The plaintiff claims that his pro rata share, by virtue of his ownership of the sixty shares of stock in the corporation amounts to the sum of $108.00.

(b) The second cause of action is the same as the first except that the plaintiff claims the right to recover through the assignment of 798 shares of stock of Charles A. Miller on the 10th of September, 1919, and claims 2½ per cent by virtue of being assignee of Miller of certain shares of stock. He alleges that Miller acquired "30 shares August 15, 1911; 100 shares December 9, 1911; 200 shares April 7, 1912; 100 shares March 19, 1913; 100 shares April 29, 1913; 100 shares October 17, 1913; 70 shares March 1914; 100 shares March 1914; 100 shares August 10, 1915; 158 shares March 1917. That Miller sold 80 shares in March, 1912; 100 shares in March 1913; 15 shares in March, 1914; 15 shares in October, 1916; 20 shares in March, 1917; 25 shares in March, 1917; and 5 shares in April, 1917." That by reason of the Miller stock he is entitled to $1436.40 out of the 2½ per cent which the defendant received from the corporation from time to time as the dividends were declared.

(c) As to the third cause of action the plaintiff alleges that the defendant received from the corporation $52,500 as follows: January, 1919, $25,000; June, 1919, $25,000, and January, 1920, $2,500; and that by virtue of the ownership of the 60 shares of stock above mentioned he is entitled to $315.00, or $5.25 per share.

(d) As to the fourth cause of action plaintiff claims recovery of $4,189.50, or $5.25 per share by virtue of the 798 shares of the Miller stock and by virtue of the assignment of September 10, 1919, from Miller to the plaintiff. He does not base any claim for recovery as to the fourth cause of action upon his ownership of stock but by reason of the ownership of the stock by Miller and the subsequent assignment of said stock by Miller to the plaintiff.

After the demurrer of the defendant had been overruled, the defendant filed its amended answer to the seventh amended complaint, denying the allegations of the complaint generally and setting up affirmative defenses as follows:

For a further and first affirmative defense to the seventh amended complaint of the plaintiff, this defendant alleges:

I

That the Pacific Cold Storage Company is a corporation organized under the laws of the State of Washington with its principal place of business in the city of Tacoma, Pierce County, Washington; that said corporation was organized on or about the 8th of April, 1897, with a capital stock of $150,000; that subsequently the capital stock of said corporation was increased to $500,000 and later increased to $1,000,000, consisting of 10,000 shares of the par value of $100 each; that at the time of the first and second increase of the capital stock of the corporation, a large percentage of the capital stock of said corporation was acquired, held and owned by residents of Glasgow, Scotland, and other places in Great Britain; that more than 90 per cent of the capital stock of said corporation was owned and held by residents of Great Britain long prior to June 1, 1911, and down to the date of the dissolution of the corporation.

II

That by reason of the fact that such a large percentage of the capital stock of the corporation was held in Great Britain, an advisory committee was

appointed by the stockholders residing in Great Britain with the consent and approval of the defendant and of all the stockholders of said corporation residing in the United States; that the creation of said committee was the joint action of all of the stockholders of the corporation. This defendant alleges upon information and belief that the advisory committee was created by a written agreement of the stockholders at that time residing in Great Britain and that the stockholders residing in the United States verbally assented thereto and acquiesced herein; that in any event, whether said agreement by the foreign stockholders was in writing, nevertheless, the advisory committee was appointed by the verbal consent of the stockholders residing in Great Britain; that the defendant has no copy of such writing and does not know the date thereof but that said advisory committee was appointed about the time of the first increase of the capital stock of the corporation and continued to be appointed and maintained down to the date of the dissolution of the corporation as hereinafter stated; that the appointment of the advisory committee for the stockholders in Great Britain was continuously verbally approved by the stockholders in Great Britain and in the United States; that the creation,

maintenance and continuance of said advisory committee was the result of the unanimous action of all of the stockholders of the corporation verbally expressed from time to time at the annual meetings of the stockholders in the city of Seattle and at the meeting of the stockholders approximately the same time residing in Great Britain. That no resolution appears upon the minutes of the meetings of the trustees or stockholders of the corporation but that affirmative action was taken at such meetings verbally; that all important business affecting the affairs of the corporation and its operations was submitted to the advisory committee for its approval; that said advisory committee by the consent of each and all of the stockholders of the corporation verbally given was clothed with powers to enable it to control and regulate and dictate the policies of the corporation, subject only to the approval of the board of trustees of the corporation; that such action by the board of trustees of the corporation was taken at the annual meeting of the stockholders and at the first meeting of the board of trustees after each stockholders' meeting but not spread upon the minutes; that it was agreed by each and all of the stockholders of the corporation that such advisory committee should have the same pow-

ers with regard to the control of the management of the affairs of the corporation as a board of trustees or directors would ordinarily possess and exercise; that such action was verbal but was the action of the stockholders individually and the action of the board of trustees taken at regular meetings of the board of trustees; that full and complete statements and reports of all of the important business of the corporation was submitted to such advisory committee for its approval before action was taken thereon and that the officers of the company continuously and uniformly complied with the requests of such advisory committee in the conduct and management of the affairs of the corporation at all times. That Mr. David Inglis was the secretary of said advisory committee from the date of its creation to the date of the dissolution of the corporation, and that all statements, audits and reports were sent to the advisory committee in care of the said David Inglis. That the correspondence between the said David Inglis and the corporation has been submitted to the plaintiff, that is to say copies of letters from the corporation to Inglis have been submitted to the plaintiff and the original letters from Inglis to the corporation touching such matters have also been submitted to the plaintiff.

III

That from the year 1901 until the date of the dissolution of the corporation, on or about the 3d of June, 1919, the defendant Charles Richardson, was the president and a member of the board of trustees of said corporation and had active charge and management as such president of the affairs of said corporation, performing the duties prescribed by the by-laws of the corporation; that for several years prior to January 1, 1911, the said defendant as such president, drew a salary of $1,000 per month; that on or about the 14th day of December, 1910, the defendant communicated with the advisory committee and indicated that he was not satisfied with the salary that he had been drawing as such president and requested some additional compensation: that on the 13th of January, 1911, the said advisory committee in answer to the defendant's letter of December 14, 1910, wrote the defendant as follows:

"As regard your own remuneration—Since you raised the point a short time ago, the board have had the matter before them, and it was their intention that they would shortly have made you a proposal that you be allowed by way of increased emolument, and annual commission or bonus on the total

amount of dividend paid to the shareholders in each year. Such bonus, they propose should be at the rate of 2½ per cent beginning with the current year.

"They trust that you will view these proposals as a favorable settlement."

That the defendant accepted such proposal and agreed to accept by way of additional compensation for his services a sum from the corporation equal to 2½ per cent upon the amount of the annual dividends paid by the corporation to its shareholders; that the arrangement thus made between the advisory committee and the defendant was communicated by the defendant to the board of trustees of the corporation and was in all things approved by the trustees of the corporation annually at the various meetings of the board of trustees and particularly at the first meeting after the annual stockholders' meeting; that no record of the resolution approving such arrangement was placed upon the minutes but that the resolution was adopted by the unanimous vote of the trustees at such meetings verbally; that such arrangement for additional compensation in the amount above stated was thereafter with the consent and approval of the board of trustees of the company, continued until January, 1918, covering the intervening years from January, 1,

1911, to December 31, 1917, inclusive, and that said additional sum was equal to 2½ per cent of the amount of the dividends declared and paid to the stockholders and was paid to the defendant on or before the first of January of each year of said period and at the meeting of the board of trustees held about the time the payment was made, the matter was brought before the board and continuously adopted by verbal action of the board but no record was made thereof upon the minutes.

IV

That all dividends declared by the corporation were paid by the corporation to the shareholders in the amounts of the dividends so declared; that no portion of said 2½ per cent was deducted from the dividends declared to the shareholders, that the shareholders received the full amount of the dividends annually declared during said period but that said 2½ per cent additional emolument or compensation to defendant's salary was paid by the corporation and that the amounts so paid were measured by the computation of 2½ per cent upon the annual dividends declared and paid to the shareholders; and that such payment of 2½ per cent was

ratified and approved by the action of the board of trustees of the corporation and by the stockholders of said corporation; that the authorization of the payment of said additional compensation of 2½ per cent was authorized by the board of trustees, by the advisory committee and by the stockholders prior to the several dates upon which the same were paid to the defendant as such additional compensation for his services as president of the corporation; that the arrangement for the additional compensation hereinbefore set forth and the action taken by the board of trustees thereon as stated in the preceding paragraphs is hereby referred to and made a part of this paragraph.

V

That at the time such arrangement for such additional compensation of 2½ per cent was made, and continuously thereafter until about the first of June, 1918, the plaintiff Frederick L. Denman was the secretary and auditor of the corporation and that it was his duty as such auditor and secretary to keep the record and account books of the corporation and to make up vouchers explanatory of all disbursements; that from year to year as such addi-

tional compensation was paid by the corporation to the defendant, the said plaintiff, Frederick L. Denman, made up such vouchers; that the explanation upon the vouchers for such additional compensation was substantially as follows:

"Extra on 2½ per cent of total dividend as per order on file."

together with the amount so paid to the defendant; that the order on file referred to in vouchers by the said plaintiff, Frederick L. Denman, was the agreement or order of the said advisory committee; that each year the account books of the corporation were audited and a report of such audit made and in such audits so annually made the 2½ per cent additional compensation was included and explained; that such audits were submitted to the advisory board and to the stockholders represented by the advisory board and were approved by them and that such audits were submitted to the board of trustees annually and to the stockholders' meetings in the city of Tacoma, and were approved by the board of trustees and by the stockholders, and that the checks drawn by the corporation in payment of said additional compensation were signed by the said plaintiff, Frederick L. Denman; that the payment of such additional compensation was authorized by

the board of trustees of the corporation and by the stockholders and subsequently ratified by the board of trustees and by the stockholders and continued from the time the arrangement was put into effect in 1911 down to and including the year 1917 without the objection or protest or criticism of any stockholder or officer and during a considerable portion of the period the said Frederick L. Denman was one of the trustees of the said corporation. That the audits referred to in this paragraph were in writing and were prepared usually by Eli Moorhouse & Co., chartered accountants and that such reports were then submitted to the plaintiff. That on January 13, 1912, the defendant wrote the following letter to Frederick L. Denman:

"Tacoma, Wash., Jan. 13, 1912.

"F. L. Denman, Auditor,
Pacific Cold Storage Company,
Tacoma, Wash.

"Dear Sir:

"By virtue of a resolution passed by advisory board at its annual meeting in January, 1911, I was voted two and one-half (2½) per cent as a bonus on all dividends declared, in addition to my salary.

"You will therefore issue me a check for two and one-half per cent of the dividend in addition to my

regular dividend.

"Yours truly,
CHARLES RICHARDSON,
President."

That remittance statement No. 19982 contained a check in favor of Charles Richardson for $2500 which was entered in the Pacific Cold Storage Company's audited voucher record at page 23, under date of January 13, 1912, and was charged to office expense. In like manner and in similar vouchers defendant was paid $2500 in 1913; $2500 in 1914, $1500 in 1915, $2000 in 1916, $2000 in 1917 and $5000 in 1918. These payments are all shown on the books of the company and are included in the annual reports prepared by its auditor who was at that time the plaintiff, and by chartered accountants. On page 232 of the record of trustees' meetings, dated January 7, 1913, the following resolution was made:

"Upon motion of Mr. Davis, seconded by Mr. Denman, (plaintiff), it was unanimously carried that the report of the president covering the year ending September 30, 1912, together with the statement of assets and liabilities and profit and loss account for the same period, be approved and adopted."

The payment of $2500 in 1912 was a part of the profit and loss account. Again on page 243 under

date of January 15, 1914, the following record was made:

"Reports of the officers for the year ending September 30, 1913, were approved, accepted and placed on file."

These reports included the annual statement of accounts, including the payment to Mr. Richardson of $2500 in 1913. As to the years 1914 and 1915, no formal action was recorded but the action was taken as hereinbefore stated. On May 31, 1917, the following record appears:

"Moved, seconded and unanimously carried that the accounts as presented by the chartered auditors, Moorhouse & Co., be approved, and the acts of the board of trustees were also approved."

This refers to the accounts of 1916 including the $2000 paid Mr. Richardson that year. At the annual meeting of the stockholders on May 31, 1918, the following resolution was adopted:

"Resolved: That the annual accounts as audited by Eli Moorhouse & Company, chartered accountants, for the year ending September 30, 1917, now on file, be and the same are confirmed and approved."

These annual accounts included $2000 paid Mr. Richardson in 1917. But at all of the meetings of

the trustees declaring dividends the arrangement as to the 2½ per cent additional compensation was unanimously approved, although not spread upon the minutes in all cases.

VI

That about two years prior to the 31st of May, 1918, the defendant submitted to the advisory board a suggestion of liquidating the corporation and at such time suggested that if it were finally decided to liquidate the corporation, defendant thought that he should be paid a commission upon the amount of money realized from the sale of the assets and their conversion into money and further indicated to said advisory board that he considered five per cent upon the amount so realized as a reasonable and just compensation; that the advisory board authorized and approved the payment of said commission of 5 per cent and that said agreement so made between the advisory board and defendant was thereafter ratified and approved by the board of trustees of the corporation and by the stockholders thereof; that the approval herein referred to is set forth in the exhibit attached to the answer. That at the meeting of the stockholders of the cor-

poration held on the 31st of May, 1918, the following resolution was unanimously adopted:

"WHEREAS, it is desired by the stockholders that the company should be liquidated and all of its assets sold and that a return of the capital be made as speedily as possible,

"THEREFORE BE IT RESOLVED, That the officers of this company are directed to sell and dispose of all of the assets of the company as rapidly as possible and wind up its affairs returning to the shareholders the amount realized therefor."

That said corporation was not, however, dissolved until the 2nd of June, 1919, when an order was duly entered in the Superior Court of Pierce County, Washington, dissolving and disincorporating said company. That on or about the 31st of May, 1918, the defendant submitted to the advisory board a proposal to convert the assets of the company into money and to devote his time to the liquidation of the affairs of the corporation for a commission of five per cent on the amounts returned to the shareholders; that later and on July 12, 1918, the defendant again submitted a written proposal to the advisory board, in which he stated that he would devote his time to the liquidation of the company for a commission of 5 per cent on the amounts returned to the shareholders, his salary to cease

on September 30, 1918; that out of this commission he would pay all commissions and attorneys' fees that he found necessary to be paid in winding up the company, excepting amounts paid in connection with the sale of the "Elihu Thompson," a vessel belonging to the corporation, and that he would retain the services of R. J. Davis and B. A. Moore for as short a time as possible, who should be paid their present salaries by the corporation. He further stated to the advisory board that it was not his intention to engage in any other business until the company's affairs had been wound up and complete returns made to the shareholders; that this would preclude him from earning anything else during such time; that he hoped to liquidate the company within a year but that contingencies might arise that would require his services for a longer period; that while it should be optional with him, he expected to pay out of his commission of 5 per cent any other officers of the corporation who might be of assistance to him in closing its affairs; that on the 18th of August, 1918, the advisory board agreed to said proposal for remuneration as stated in defendant's letter of July 12th and later and on the 21st day of August, 1918, said proposal was further accepted by letter from the advisory board; that

immediately upon the receipt of said cablegram or wire from the advisory board the proposed arrangement by which the defendant should receive a commission of five per cent upon the amounts returned to the shareholders was submitted to the board of trustees of the corporation and the same was approved by them and accepted by the defendant and the agreement consummated; that later, and on the 7th of January, 1918, the arrangement for the payment of said commission of five per cent to the defendant was again brought before the board of trustees at a meeting of such board held on said date, and a resolution was duly adopted by the unanimous vote of the board of trustees with the exception of the defendant, who did not vote thereon, said resolution being as follows:

"WHEREAS it appears from correspondence between Charles Richardson and the advisory board of Glasgow, as shown in a letter from Mr. Richardson of July 12, 1918, and cable in reply of August 18, 1918, and letter of confirmation of August 21, 1918, that an agreement as to compensation to Mr. Richardson for his services in winding up the company and disposing of the assets has been reached so far as it affects a large majority of the shares of the company, and

"WHEREAS, it appears that said agreement is fair and just and that such compensation is reasonable,

"THEREFORE BE IT RESOLVED that the offer contained in the letter of Mr. Richardson of July 12, 1918, be, and the same is hereby accepted and the agreement as set forth in the correspondence between Mr. Richardson and the advisory board as herein referred to be, and the same is hereby confirmed and ratified and the officers of this company are authorized and directed to pay the compensation therein named and to fully carry out all of the terms of said agreement."

That the resolutions referred to are set forth in Exhibit A attached to the answer. That the proceedings taken at said meeting of the board of trustees are all found in Exhibit "A" attached to the answer. That the foregoing resolution was offered at said meeting by Mr. Harold Seddon, who moved its adoption, which was seconded by Mr. Charles A. Miller, the owner at that time of 798 shares of the capital stock of the company, being the same Charles Miller named in paragraph II of the of the second and fourth causes of action.

VII

That prior to September 1, 1918, the defendant sold and disposed of a portion of the assets of the corporation and shortly after the first of September, 1918, the corporation declared a dividend by way of

a distribution of the capital assets of the sum of $500,000.00 and the same was paid by the corporation to its stockholders and later, and on or before June 1, 1919, the defendant converted other and additional assets of the corporation into money in the sum of $500,000.00 and the same was distributed by way of a dividend in the distribution of the capital assets of the corporation on or about the 2d of June, 1919, and the same was received by the shareholders and a further dividend was declared and paid in the sum of $50,000, making a total distribution of the capital assets to the stockholders in the sum of $1,050,000.00; that said agreement for the payment of said commission of five per cent was approved by the advisory board and approved by the board of trustees of the corporation prior to its payment and was subsequently ratified by the action of the shareholders; that the payment of said commissions was authorized by the board of trustees; that the large returns to the stockholders was due to the efforts of the defendant in making advantageous sales and disposition of the assets; that if the said defendant had not sold said assets at the time they were sold the returns to the stockholders would have been less by the sum of several hundred thousand dollars; that the defendant procured the

most advantageous and favorable sales of said assets; that the defendant ceased drawing his salary of $1,000.00 per month on the 30th of September, 1918, in accordance with his said agreement; that at the time said agreement was made for the commission of five per cent the defendant did not know and could not know whether his time would be consumed for a period of one year or two or three years; that it might have taken even a longer time than three years had not the defendant been particularly zealous and successful in the prompt sale and disposition of said assets; that the ratification referred to is shown by Exhibit "A" and by the proceedings of the board of trustees held on January 7, 1919.

That on the 31st of May, 1919, the following named persons at a meeting of the stockholders of the corporation were elected trustees, to-wit: Charles Richardson, Harold Seddon, B. A. Moore, E. J. Walsh, Ralph S. Stacey, H. C. Schweinler and R. J. Davis, who duly qualified by taking the usual oath of office and entered upon the performance of their duties as trustees; that on the second day of June, 1919, said corporation was dissolved by an order of the Superior Court of Pierce County, Washington, as aforesaid; that the above named

persons were duly elected, qualified and acting trustees of said corporation at the time of its dissolution and thereupon became the trustees of the creditors and stockholders of the corporation with full power and authority to sue and recover the debts and property of the corporation by the name of the trustees of said corporation with authority to collect and pay the outstanding debts, settle all of the affairs of the corporation and divide among the stockholders the money and other property that remained after the payment of the debts and necessary expenses; that in their capacity as such trustees under the provisions of Section 3707 of Remington's Code of the State of Washington said trustees became possessed of the money theretofore in the treasury of the corporation and the said trustees distributed the same by way of dividends and return of the capital stock to the shareholders, which distribution was made on or about June 3, 1919. That since said date all of the affairs of the corporation have been managed and controlled by said board of trustees hereinbefore named and not by this defendant except insofar as he was a member of said board of trustees.

VIII

That the said defendant at no time ever owned or controlled more than 1353 shares of the capital stock of said corporation; that all sums paid to this defendant were authorized previous to such payments by the board of trustes and by the stockholders and were subsequently ratified and approved by the stockholders, and that as to the 798 shares formerly owned by Charles A. Miller, the said Charles A. Miller voted affirmatively in favor of a resolution of the board of trustees authorizing the payment of the same as a fair and just compensation for the services to be rendered and that the said Frederick L. Denman acquired said 798 shares with full knowledge of the fact that the said Charles A. Miller had affirmatively approved the payment of said commissions to this defendant and that the said Frederick L. Denman, himself, and as the successor of the stockholders named in the amended complaint, likewise ratified and approved the action of the board of trustees in the payment of the 2½ per cent commissions hereinbefore referred to. The authorization referred to is shown by the minutes of the meeting of January 7, 1919,

heretofore referred to and the authorization was also approved by the board of trustees at meetings at which the trustees were present, held during the summer of 1918 and in the fall of 1918.

SECOND AFFIRMATIVE DEFENSE

For a further and second affiamative defense to the third and fourth causes of action set forth in the seventh amended complain, defendant alleges:

I

That the services performed by this defendant in winding up the affairs of the corporation and in selling and disposing of the assets and in the conversion of the same into money and the distribution of the same to the stockholders, were services rendered outside the cope of his official duties as president and trustee of the corporation; that the reasonable and fair value of the services rendered to the corporation by this defendant outside the scope of his official duties as president and trustee was the sum paid by the corporation for such services; that even though there was no express con-

tract between the corporation, its trustees and stockholders for the payment of said services, the defendant is entitled to the sums paid for the reason that they were reasonably fair and just for the services rendered outside the scope of the official duties of the defendant as provided by the by-laws of the corporation and that an implied contract was created for such services even though the court should hold that there was no express contract for the payment of the amount received by the defendant in the winding up of the corporation, the conversion of its property into money and the distribution of the same among the stockholders.

THIRD AFFIRMATIVE DEFENSE

For a further and third affirmative defense to the seventh amended complaint, defendant alleges:

I

That by reason of the actions of the said Frederick L. Denman and Charles A. Miller and by reason of the acts and things done and performed by them as set forth in the first affirmative defense,

to which reference is hereby made and the same is hereby made a part of this third affirmative defense, the said plaintiff is estopped from claiming a return of said commissions, or any part thereof from this defendant; that as to the $1436.40 claimed by the plaintiff in the second cause of action, the payments were made in January, 1912, 1913, 1914, 1915, 1916, 1917 and 1918; that this action was not commenced until more than three years after January, 1918; to-wit, on November 21, 1921, as to the second cause of action and that the liability of the defendant, if any, accrued more than three years before the commencement of the second cause of action and is barred by the statute of limitations.

FOURTH AFFIRMATIVE DEFENSE

For a further and fourth affirmative defense to the seventh amended complaint, this defendant alleges:

I

That as to the first cause of action, the payments were made in the months of January, 1912, down to and including January, 1918, and that all of the

amounts claimed by the plaintiff in the first cause of action accrued, if at all, more than three years prior to the date of the commencement of this action except as to the payments in January, 1917, and 1918, and that the same are barred by the statute of limitations.

FIFTH AFFIRMATIVE DEFENSE

For a further and fifth affirmative defense to the seventh amended complaint, this defendant alleges:

I

That at the time of the commencement of this action, the said Charles A. Miller was the owner of 798 shares of the capital stock of the Pacific Cold Storage Company; that no claim of the said Charles A. Miller accrued while he was the owner and holder of said 798 shares of stock; that no assignee of the claim of Charles A. Miller so accruing can be maintained in the courts of the United States under Equity Rule 94, or at all, either in law or in equity. (Trans. pp. 64-91.)

In all the causes of action, plaintiff alleges that the corporation was dissolved by an order of the court on the 2d of June, 1919, and that the defendant appropriated all of the sums claimed, wrongfully and without right while acting as president and trustee of the corporation. The corporation remained in existence until the 2d of June, 1919. The alleged misappropriations by the defendant occurred while the corporation was still in existence and undissolved. The corporation, therefore, had a legal claim against its officers and trustees for any money that had been misappropriated by the defendant from the corporation. A cause of action for such alleged wrongs on the part of the defendant rested solely in the corporation. The corporation alone had the right to sue for the recovery of the alleged misappropriations. No stockholder could maintain an action in his own name. The stockholder had no claim against the trustee who had misappropriated the funds for the corporation. He had no contractual relation with the defendant. His action was not direct against the defendant but was derivative through the corporation. There was no privity between the defendant and the plaintiff or Miller. If the defendant took any of the funds of the corporation to which he was not en-

titled, the plaintiff had no cause of action directly against him. He did have the right, if the directors of the corporation refused to bring suit, to commence an action on behalf of the corporation for the recovery of the funds for the benefit of the corporation, but not for his own direct benefit. If the corporation wrongfully paid out any money to any trustee or to anyone else not entitled to it, the corporation alone had the right to recover such sums unless the directors refused to do so when properly requested by the stockholder. It is apparent that the plaintiff is seeking to recover from the defendant the moneys and assets which belonged to the corporation at the time the alleged misappropriations occurred while the corporation was still in existence. If the defendant misappropriated any of the funds of the corporation wrongfully and without right it is plain that the corporation had the right, and it was its duty to sue the defendant for the recovery of the assets so wrongfully misappropriated. The right of action rested primarily in the corporation. If the corporation had sued for the recovery of the sums so misappropriated, there could be no doubt as to its right to recover the same. This right to recover funds misappropriated by an officer or trustee of the corporation cannot

rest both in the stockholders and in the corporation. It is the liability of the recreant trustee to the corporation. If the corporation is dominated by the recreant trustee so that the corporation is helpless and cannot bring the action itself, then a stockholder could set the machinery of the courts in motion to recover the funds so misappropriated, for the benefit, however, of the corporation.

But the stockholder cannot set the machinery in motion in any action in the federal court unless he alleges in his complaint that the money was misappropriated at a time when he, himself, was a stockholder. There is no such allegation in the complaint except as to the 60 shares held by the plaintiff originally. As to the Miller stock, the complaint clearly shows that Miller was the owner of the stock at the time all of the misappropriations occurred, except as to the last payment of $2,500 in January, 1920.

In all cases where the cause of action rests primarily in the corporation and the action is instituted by the stockholder for the benefit of the corporation for the reason that the directors of the corporation refused to bring the suit, being dominated by the recreant trustee, the corporation was an indispensable party, and the action is one in equity and not at law.

Throughout the progress of this case, the defendant contended that the action was one in equity and not a law. Whether the action was one at law or in equity must be determined by the pleadings themselves and from the allegations of the complaint. It is true that the lower court declined to treat the action as one in equity and construed the action to be one at law over the continuous objection of the defendant. It is still our contention that the action is one in equity and not at law and must be governed by the rules of the federal equity practice. It is true, the court submitted the case to a jury, but if the action was in fact in equity and not at law, we think the verdict of the jury in this case must be treated as solely advisory and not binding upon the court.

The demurrer to the complaint should have been sustained upon all of the grounds stated in the various demurrers. Measured by the rules regulating the federal equity practice, the complaint fails to state a cause of action and the judgment of the lower court was correct and must be upheld by this court. No allegation was made in the complaint showing any compliance, or attempted compliance with equity rule 94, which merely restates the law as it existed prior to the promulgation of such rule.

In derivative actions such as this, the corporation is always a necessary and indispensable party.

"* * * before the shareholder is permitted in his own name, to institute and conduct a litigation which usually belongs to the corporation, he should show, to the satisfaction of the court, that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it."

Hawes v. Oakland, 104 U. S. 450.

None of these necessary allegations are contained in the complaint.

THE CORPORATION AN INDISPENSABLE PARTY

Whenever a stockholder brings an action for the recovery of money misappropriated by a trustee or agent:

"The corporation itself is an indispensable party defendant to a stockholder's action for the purpose of remedying a wrong, which the corporation itself should have remedied. This rule is due to the fact that the corporation is entitled to be heard. A similar possible suit by the corporation is thereby prevented and the remedy made effective against the corporation as well as others. The corporation is a necessary party defendant, and must be actually brought into court by service or otherwise even though it is a foreign corporation and cannot be served and refuses to appear."

3d Cook on Corporations, Sec. 738.

The rule that the corporation is an indispensable party is discussed with wonderful clearness and ability by Pomeroy in his last edition of his work on Equity Jurisprudence.

"It is absolutely indispensable that the corporation itself should be joined as a party—usually as a co-defendant. The rationale of this rule should not be misapprehended. The stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the cause of action is *his*, or because *he* is entitled to the relief sought; he is permitted to sue in this manner *simply in order to set in motion the judicial machinery of the court.* The stockholder, either individually or as the representative of the class, may commence the suit, and may prosecute it to judgment; but in every other respect the action is the ordinary one

brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained belongs to the corporation, and not to the stockholder-plaintiff. The corporation is, therefore, an indispensably *necessary* party, not simply on the general principles of equity pleading in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no interest in the subject-matter of the controversy nor in the relief. In fact, the plaintiff has no such *direct* interest; the defendant corporation alone has any direct interest; the plaintiff is permitted, notwithstanding his want of interest, to maintain the action solely to prevent an otherwise complete failure of justice."

3d Pomeroy, Sec. 1095.

In the case of *Greaves v. Gouge*, 69 New York, 156, the action was brought by a stockholder to recover funds misappropriated by the president of the corporation. In that case the court says:

"There is no doubt that a stockholder has a remedy for losses sustained by the fraudulent acts, and for the misapplication or waste of corporate funds and property by an officer of the corporation; but the weight of authority is in favor of the doctrine that an action for injuries caused by such misconduct must be brought in the name of the corpora-

tion, unless such corporation or its officers, upon being applied to for such a purpose by a stockholder, refuse to bring such action. In that contingency, and then only, can a stockholder bring an action for the benefit of himself and others similarly situated, and *in such an action the corporation must necessarily be made a party defendant.*"

"The right to maintain a suit against the officers of a corporation for fraudulent misappropriation of its property is a right of the corporation, and it is only when the corporation will not bring the suit that it can be brought by one or more stockholders in behalf of all. (Hawkes v. Oakland, 104 U. S. 450.) The suit when brought by stockholders, is still a suit to enforce a right of the corporation, and to recover a sum of money due to the corporation; and the corporation is a necessary party, in order that it may be bound by the judgment. (Davenport v. Dows, 18 Wall. 626.) If the corporation becomes insolvent, and a receiver of all its estate and effects is appointed by a court of competent jurisdiction, the right to enforce this, and all other rights of property of the corporation, vests in the receiver; and he is the proper party to bring suit, and if he does not himself sue, should properly be made a defendant to any suit by stockholders in the right of the corporation."

Porter v. Sabin, 149 U. S. 473.

"That a stockholder may bring a suit when a corporation refuses is settled in Dodge v. Woolsey, 18 Howard 340, but such suit can only be maintained on the ground that the rights of the corporation

are involved. These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. The relief asked is on behalf of the corporation, not the individual shareholder; and if it be granted, the comlpainant derives only an incidental benefit from it. It would be wrong, in case the shareholder were unsuccessful, to allow the corporation to renew the litigation in another suit, involving precisely the same subject-matter. To avoid such a result a court of equity will not take cognizance of a bill brought to settle a question in which the corporation is the essential party in interest, unless it is made a party to the litigation."

18 Wallace 626.

The overwhelming weight of authority supports the proposition that in cases of this kind, the corporation is not only a necessary, but an indispensable party. The state and federal cases without exception sustain the proposition. For misappropriations of the assets of the corporation such as those alleged in the complaint, the stockholder can only sue as the representative of the corporation. In his individual capacity he has no right or power to sue

a recreant trustee for the misappropriation of the corporate funds or property. Therefore, if a suit can be maintained at all, it must be maintained in his representative capacity and the corporation must be a necessary and indispensable party. The authorities of the state and federal courts sustaining this contention of ours are so numerous that no useful purpose would be subserved by attempting to cite all of them. The following are a few of the cases in addition to those which we have cited:

Smith v. Hurd, 53 U. S. 383.
Ninneman v. Fox, 43 Wash. 43.

The opinion in the Ninneman case was written by Judge Rudkin, in which he says:

"The right of a third party to maintain an action for injuries resulting from a breach of a contract between two contracting parties, has been denied by the overwhelming weight of authority of the state and federal courts of this country and the courts of England. To hold that such actions could be maintained, would not only lead to endless complications, in following out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume."

He further says:

"If it be claimed that the acts of the respondents amounted to a tort against the corporation, the same rule applies."

Counsel for plaintiff, however, insists that the Pacific Cold Storage Company has been dissolved and that the dissolution of the company in some manner distinguishes the present case from the cases where the corporation is still in existence at the time the stockholder brings the representative suit for the benefit of the corporation. But under the statutes of the State of Washington relating to dissolved corporations, all of the assets, powers and privileges of the corporation are vested in the trustees of the company at the time of the dissolution They are clothed with the power to collect the assets of the corporation, to maintain suits for and on behalf of the corporation, to collect the assets, pay the debts and distribute the balance to the stockholders and in general to manage the affairs of the corporation in the same way as though the corporation were still in existence.

Section 3707, 1st Remington's Code is as follows:

"3707. *Power of Trustees upon Dissolution of Corporation.* Upon the dissolution of any corpora-

tion formed under the provisions of this chapter, the trustees at the time of the dissolution shall be trustees of the creditors and stockholders of the corporation dissolved, and shall have full power and authority to sue for and recover the debts and property of the corporation by the name of the trustees of such corporation, collect and pay the outstanding debts, settle all its affairs, and divide among the stockholders the money and other property that shall remain after the payment of the debts and necessary expenses."

The statute vests in the trustees at the time of the dissolution the same powers and duties that the corporation had. As we have already seen, the courts uniformly hold that where a receiver of the corporation has been appointed, the receiver is a necessary and indispensable party. The reason of this rule is that all of the powers of the corporation are vested in the receiver. By operation of law, upon the dissolution, such powers and duties are vested in the trustees at the time of the dissolution and it is also uniformly held that the receiver is a necessary party, even though he be discharged. In the case of *Michel v. Betz*, 95 N. Y. Sup. 844, this question arose. A receiver had been appointed for the corporation and had been discharged. The court held that he was a necessary party and further said in the opinion:

"If it should be held that this receiver was divested of this cause of action by reason of his discharge as receiver, it would follow, I think, that the cause of action would then vest in the directors of the corporation, as trustees for the creditors and stockholders, under the provision of section 30, of the General Corporation Law, chapter 687, p. 1811, Laws 1892. The corporation being dissolved, it would own no property. The property would then vest in the directors of the corporation, who would become trustees for the creditors and stockholders, and would be entitled to enforce this cause of action and would be necessary parties thereto. I think, therefore, that the action cannot be maintained, without the presence of either the receiver or directors of the corporation as either parties plaintiff or defendant, and that for that reason the demurrer should have been sustained."

The New York statute vesting in the trustees powers formerly exercised by the corporation, is very similar to the statute of this state. The New York statute was construed in the case of *Marstaller v. Mills*, 38 N. E. 370, in which it was held that the directors at the time of the dissolution took the place of the corporation and succeeded to all its rights and privileges as well as its powers and duties. In the case of *Taylor v. Holmes*, 127 U. S. 489, the action was brought by the stockholders instead of the corporation to correct a deed given by

the corporation. In the *Taylor v. Holmes* case it was held:

"In a bill filed by two stockholders to correct a deed to the corporation, an averment that complainants are owners of a majority of all of the stock, but without any statement as to how or where they became such, or whether they were such at the time the matter complained of occurred, or became stockholders afterwards, is not a sufficient averment of their relation to the corporation, or of their interest in the subject of the suit, to enable them to bring the suit in their own names, where it appears that, although the corporation has expired by limitation, it still exists for the purpose of winding up, and that, although most of the directors are dead, one of them survives, and that no application has been made to him to bring the suit, nor any effort to call together the stockholders or to obtain any united action in the assertion of this claim."

The court further said in *Taylor v. Holmes*:

"It is, however, alleged that the corporation itself is extinct by reason of the limitation placed upon its existence, under the articles of incorporation, by which it expired on the 30th day of August, 1878. But, under the laws of New York, the existence of such a corporation was continued after the period for which it was limited for the purpose of winding up its business, and for the purpose of collecting and distributing its assets and paying its debts. Although the allegation of the bill is that many of the directors of the company are dead, still it is

shown that one of them survives, and no assertion is made that there was any application to this surviving director on the part of the defendants for the purpose of instituting any proceedings looking to the rectification of this deed, or for the recovery of the real estate in North Carolina; nor does it appear that there was any request made to him to bring any suit either at law or in chancery for that purpose. No effort was made to call together the stockholders to take any action on the part of the company, or to elect other directors, or to obtain any united action in the assertion of the claims now set up. Although there is in the bill a declaration that the two complainants are owners of a majority of the stock of the Gold Hill Mining Company, there is no statement as to when or how they became such, or whether they were such stockholders during the times that injuries were inflicted, of which they now complain, in regard to the taking possession of the property by the defendants, or whether they became stockholders afterwards. In short, there is no such averment of their relation to the corporation, or of their interest in the matter about which they now seek relief, as brings this action within the principle of the decisions of this court upon the subject."

8 Supreme Ct. Rep. page 1193.
Hawes v. Oakland, 104 U. S. 450.

In the case of *Taylor v. Holmes*, the charter of the corporation had expired. Its affairs were in the hands of the trustees or directors under the laws

of New York, which are similar to the laws of this state. The action was dismissed for the reason that the corporation, or its successors or officers were necessary parties even though it had been dissolved by expiration of its charter.

The trustees of the Pacific Cold Storage Company at the time of its dissolution were made statutory trustees for the winding up of the corporation. They had the power to bring a suit against the defendant for the recovery of these very sums. The statute provides that the suit shall be brought in the name of the trustees and that any sums collected that had been misappropriated by the defendant belong to the trustees for distribution among the stockholders. No one can doubt that the trustees under the statute, had the right to sue Richardson for this money about which the plaintiff complains. The right existed in the corporation before the dissolution. By the decree of dissolution this right was assigned, by operation of law, to the trustees. They took the place of the corporation and acquired a cause of action that was formerly primarily vested in the corporation. The right to sue cannot be vested in both the trustees and the stockholders. The dissolution of the corporation vested this right in the trustees. They alone can maintain the action. The

rule is unquestionable that the corporation is an indispensable party. The same reason underlying the rule with regard to the necessity of making the corporation an indispensable party applies with equal force to the statutory trustees upon dissolution. The action primarily rests in the trustees so far as the stockholders are concerned. The stockholder cannot maintain an action in his own name unless he shows that a demand has been made upon the trustees to bring the action and that they have refused to do so. If Richardson misappropriated the money there was an implied promise upon his part to return it. A contractual relation existed between Richardson and the corporation. Its effect was the same as though a contract had been made between Richardson and the corporation to return the money he had misappropriated.

The plaintiff claims the right as a stockholder to maintain an action for injuries resulting to it for a breach of a contract between two contracting parties, that is, between Richardson and the corporation. Such right has been denied by the overwhelming weight of authority of the state and federal courts of this country and the courts of England.

"To hold that such actions could be maintained, would not only lead to endless complications, in fol-

lowing out cause and effect, but would restrict and embarrass the right to make contracts by burdening them with obligations and liabilities to others, which parties would not voluntarily assume."

Ninneman v. Fox, 43 Wash. 43.

In the same case it was further said:

"If it be claimed that the acts of the respondents amounted to a tort against the corporation, the same rule applies."

The plaintiff is seeking by what he denominates an action at law to sue directly, Richardson for moneys Richardson owed the corporation during its existence, and after dissolution, which he owed to the trustees. This cannot be done in an action at law. The plaintiff is seeking to enforce rights vested in the statutory trustees on dissolution.

"But even if the circumstances were such as to justify individual stockholders in seeking the aid of the court to enforce rights of the corporation, it is clear that their remedy is not at law. The particular equitable relief sought in Fleitmann v. Welsbach, 240 U. S. 27, was denied; but this denial affords no reason for assuming that the long-settled rule under which stockholders may seek such relief only in a court of equity will be departed from because the cause of action involved arises under the Sherman law."

United Copper Securities Co. v. Amalgamated Copper Co., 244 U. S. 261.

In the note to the above case the court says:

"Quincy v. Steel, 120 U. S. 241, was an equity suit by a stockholder to enforce a purely legal claim of the corporation—damages for breach of contract; and the court sustained a demurrer to the bill, not because the suit should have been at law, but because the bill failed to show that complainant had made sufficient effort to induce the directors to enter suit."

In the case of *Von Arnim v. American Tube-works*, 74 N. E. 681, the court says:

"The plaintiff's cause of action is founded upon the right of the corporation itself to recover for the misappropriation of its property by the deceased. If any of the defendants are finally held liable to make restitution, generally reimbursement would be made not to the plaintiffs, but to the corporation which always is a necessary party to such suits, though where the exigencies of the case require it, and to avoid circuity of action a stockholder may be granted individual relief in the same suit."

So in this case if the liquidating trustees were made parties to the suit, a court of equity might grant relief to the plaintiff, if he is entitled to it. Before the court can grant relief, he is compelled to have the liquidating trustees made parties to the suit so that the court has full jurisdiction to settle the entire controversy.

Whatever sum is recovered from the defendant must be distributed by the trustees pro rata among the stockholders. All of the stockholders have as much right to any recovery for money owed by Richardson to the corporation as the plaintiff. In Cook on Corporations, section 734, page 2426, it is said:

"It is a well-established rule of law that a stockholder's suit to remedy a wrong done to the corporation must be in behalf of all the stockholders, since they are all equally interested in the results of the suit. Accordingly, the complainant or complainants must bring the suit in behalf of themselves and such others of the stockholders as care to come in. * * *

"There has been considerable controversy as to whether a suit to hold directors liable for fraud, negligence, or ultra vires acts should be at law or in equity. The well-established rule is that such a suit, when brought by a stockholder, should be in equity, inasmuch as it is in the nature of an accounting or the prevention of illegal acts. A suit at law is not the proper remedy."

In the case of *Backus v. Brooks*, 195 Fed. 452, the court said:

"A court of equity is the tribune and the only tribune, to provide an effective remedy."

In the case of *Jones v. Missouri-Edison Co.*, 144 Fed. 765, the court said:

"Any sale of the corporate property to themselves, any disposition by them of the corporation or of its property to deprive the minority holders of their just share of it or to get gain for themselves at the expense of the holders of the minority of the stock, becomes a breach of duty and of trust which invokes plenary relief from a court of chancery.

"If the corporation has been dissolved, or is in the process of winding up, then the suit which would otherwise have been brought in its name, may be maintained by the receiver official liquidator or other official representative who has succeeded to its property and franchises for the purpose of final settlement."

3d Pomeroy, Sec. 1094, 4th Ed.

In *Re Swoford Bros. Dry Goods Co.*, 180 Fed. 549, the court held that the right to bring a suit against the president for misappropriation of the assets of the corporation was vested in the trustee. In *Reed v. Hollingsworth*, 135 N. W. 37, it was held that a demand must be made upon a receiver before stockholders can sue. To the same effect is *Sigwald v. City Bank*, 64 S. E. 398. In *Saunders v. Bank of Mecklenburg*, 75 S. E. 94, it was held that demand must be made on receiver before stockholders can sue.

"The stockholder, either individually, or as the representative of the class, may commence the suit,

and may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder-plaintiff. The corporation is therefore, an indispensably necessary party, not simply on the general principles of equity pleading in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record, by the decree."

3d Pomeroy, section 1095.

One of the reasons that the corporation is an indispensable party is that the right of action is primarily vested in the corporation. If the right of action is primarily vested in the trustees, as the statutes of this state provide upon dissolution, then the same reasons exist for requiring the trustees to be indispensable parties. It is the duty of the trustees to collect this money from the defendant, if he has wrongfully taken it, and to distribute it among the stockholders, but the legal title to the right of action is vested in the trustees in the same way as it had been theretofore vested in the corporation. It is inconceivable that a party may maintain an action at law for a failure on the part of one party to pay another party what it owes. No sane reason can be suggested for the assertion that a corpora-

tion is a necessary party in an action of this kind and that the assignee of all of the rights of the corporation is not a necessary party. In Pomeroy's last edition of his great work on equity jurisprudence, he cites numerous cases in support of the position that we are contending for. No statement is made in the complaint that the trustees are not reputable men and men of character. If any claim exists against Richardson, it is their duty to enforce it. If they refused to do so then the plaintiff would have the right to bring the action for the benefit of the trustees and to make them parties to his litigation.

If the pliaintiff did amend his complaint and bring in the trustees and such action would not deprive this court of jurisdiction, then it is possible that the court with all parties interested before it, might make a complete adjustment of the entire conversy, even to the extent of distributing to the plaintiff his aliquot part of the recovery less the costs and expenses thereof.

It must be admitted that the liquidating trustees have the right to maintain this action against Richardson. Suppose they do institute an action against him and recover. The allegations of the complaint are that the corporation has no property other than

this. The trustees would incur considerable expense in the maintenance of such action. From the total amount recovered the expenses would necessarily be deducted before a distribution could be made to the stockholders. Therefore, it is plain that the claim is not a liquidated claim for a specific sum of money on the part of any stockholder.

If the plaintiff should prevail in this action upon the theory that the right of action is vested primarily in him, then a judgment rendered here would not be a bar to an action by the trustees or by other stockholders. If, on the other hand, the plaintiff is suing in his representative capacity, then this action would bar other stockholders because in his representative capacity the action can only be brought for the benefit of the plaintiff and all other stockholders similarly situated.

> *Williams v. Erie Mountain Mining Co.*, 47 Wash. 360.
>
> *Farmers Loan & Trust Co. v. N. Y. N. Ry. Co.*, 150 N. Y. 410.

The reasons given by Judge Rudkin in the case of *Ninneman v. Fox*, 43 Wash. 43, clearly establish the fact that an action at law can not be brought in an action of this kind. There is no privity of contract

between the plaintiff and defendant, or between the defendant and stockholders. As he has no right of action at law he has none unless it is in equity and then he must conform to the rules of law regulating the equity practice.

The statute says that upon the dissolution of any corporation the trustees at the time of the dissolution shall be trustees of the crditors and stockholders of the corporation dissolved and shall have full power and authority to sue for and recover the funds and property of the corporation by the name of the trustees of such corporation. (Remington's Code, Sec. 3707.)

The statute vests in these trustees the sole power to collect funds misappropriated by a trustee during the lifetime of the corporation. The power is not vested in anyone else. If a corporation is a necessary party, it is for the reason that the corporation alone has the right of action vested in it. If the right of action is vested in the trustees and in them alone, how can they be deprived of their property as trustees for the benefit of all of the stockholders by a direct action by one stockholder against one of the trustees for the recovery of funds paid to him during the corporate existence of the corporation?

The defendant is only one of the trustees for winding-up purposes. The statute says that all actions must be brought in the name of the trustees, not in one of them. It is inconceivable that an action can be vested in the trustees and in the plaintiff at the same time for the same cause of action. There is no authority anywhere for this contention. If the defendant owes any money that he has misappropriated, he owes it to the trustees that the statute says are entitled to have it. He does not owe it to this plainiff. All the money that he misappropriated must be for the benefit of all of the stockholders, not for this plaintiff.

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION

Inasmuch as this action is one in equity and the complaint does not contain the allegations which are indispensable under Rule 94 in the federal courts, no cause of action is stated in the complaint and the plaintiff in no event would be entitled to any recovery regardless of any errors that the court may have made in submitting the case to the jury.

STATUTE OF LIMITATIONS

It will be observed that this action was originally commenced on the 29th of July, 1919, not in the name of this plaintiff but in the name of other plaintiffs. The seventh amended complaint was filed on the 30th of November, 1921. The suit by the plaintiff as assignee of the 798 shares of the Miller stock was commenced on the last named date. It will be observed that the plaintiff claims the right to recover 2½ per cent on dividends paid in January, 1912, to January, 1918, inclusive. Any misappropriation of the funds of the corporation therefore as to the first and second causes of action accrued not later than January, 1918, and running back to 1912. If the plaintiff were entitled to recover at all, his cause of action existed when the misappropriations were made in the several years from 1912 to January, 1918 inclusive. As to the first cause of action, based upon his ownership of sixty shares of stock, the action was commenced in July, 1919. More than three years had elapsed as to all moneys converted by the defendant prior to January, 1917.

As to the second cause of action, where the plaintiff claims by virtue of the Miller stock, it is ap-

parent that this action by the plaintiff to recover upon the Miller stock was not commenced until the date of the filing of the seventh amended complaint on the 29th of November, 1921. The plaintiff did not attempt to bring the suit originally as the assignee of Miller, but brought the suit as the agent of Miller, which the court held he could not do. Therefore, when the plaintiff amended his complaint in the seventh amended edition, it was in effect the commencement of a new action and the statute of limitations would bar all claims on account of the 2½ per cent of the dividends for the reason that more than three years had elapsed since January, 1918, when the last misappropriations were made according to the allegations of the complaint.

If the plaintiff had any right of action at all, that plainly accrued at the dates the misappropriations were made and we think all of these claims are clearly barred by the statute of limitations as to the second cause of action, and as to the first cause of action except as to the payment in January, 1917, and January, 1918.

It will be noticed that all of the sums alleged to have been misappropriated by the defendant were appropriated by him prior to the dissolution of the corporation on June 2, 1919, except one payment of

$2500 in the month of January, 1920. With the exception of the $2500 paid in January and referred to in the third and fourth causes of action, all misappropriations were made by the defendant, according to the allegations of the complaint, while the corporation was undissolved and a legal entity. There is only one way to dissolve a corporation in this state and that is by an order of the court upon a proper petition. The Supreme Court of Washington has held that the capital stock of a corporation can not be decreased except in the manner prescribed by law and by analogy it must follow that the corporation can not be dissolved except in the manner provided by the statutes of the State of Washington.

Therefore it is manifest that with the exception of the $2500 payment of January, 1920, all misappropriations were from the Pacific Cold Storage Company. The corporation remained in existence until June, 1919. So much appears from the face of the seventh amended complaint and we think it was the duty of the court to have sustained the demurrer on the ground that the action was not commenced within the time allowed by law and was barred by the statute of limitations.

However, the defendant pleaded in its answer the statute of limitations and the evidence abundantly sustained the contention that the claim as to the 2½ per cent commission is barred by the statute. The plaintiff testified on cross-examination that he had charge of the books of account of the Pacific Cold Storage Company for nearly eighteen years and that everything was done under his direction so far as the accounting was concerned; that he was secretary and treasurer for a good many years and that in the early years was auditor, but only in the year 1912, and that in 1912 when this 2½ per cent dividend was paid, he was auditor and treasurer. He knew of the entry on the books of the company showing that the defendant was getting a salary of $1,000 per month and a sum equal to 2½ per cent upon the dividends paid to the stockholders and he said: "In 1912 when it was first given, I knew of it." (Trans. 109.) He signed the last check, the one of January, 1918, for such 2½ per cent commission and knew that these dividends were being paid from the year 1912 to 1918 inclusive. He said that he did not at any time ever protest to any of the sotckholders, or to the company, or at any stockholders' meeting against the payment of this 2½ per cent commission—that he did not

dare to because Mr. Richardson was the dominating party, he dominated the company. He said: "I knew my job would be good-bye and between my job and my interest in the company I wanted to stay by and watch them." (Trans. p. 110.) He said that he was an officer of the company for eighteen years and protested to no one as to the dividend and that Mr. Richardson misappropriated the 2½ per cent commission and yet since 1912 he raised no objection thereto and did not write to any of the stockholders about it and that he did not dare to do so. (Trans. p. 110.)

Mr. Denman further testified that a yearly report was prepared by the accounts showing the payment of this 2½ per cent commission as additional salary and that the same was itemized each year in a written report, so that the plaintiff is in the position of now seeking to recover his pro rata share of the 2½ per cent commission which was paid out with his knowledge every year from 1912 down to 1918. The evidence further shows that the reports of the certified public accountants with the supplement prepared by the plaintiff were mailed to the advisory committee in Scotland and distributed among the stockholders there who owned 85 per cent of the stock. The evidence further shows

that at each annual meeting of the stockholders these reports of the certified accountants were submitted to the stockholders' meeting and usually paproved by them and were always submitted to the board of trustees of the corporation at the meeting held immediately after the adjournment of the stockholders' meeting and were unanimously approved by them. (Testimony of Charles Richardson, Trans. p. 138, *et seq.*; testimony of Rufus Davis, Trans. p. 178; testimony of A. W. Sterrett, Trans. p. 171.)

So far as the 2½ per cent commission was concerned, the knowledge of its payment was brought home to the stockholders and to the board of trustees and particularly to the plaintiff. He knew of the payment of this money by the corporation to Richardson as additional salary for many years prior to the commencement of this action and for more than three years prior to the institution of this suit. The corporation and all of its stockholders had knowledge of its payment and had accurate knowlede as to the exact date of the alleged misappropriations, all of which was more than three years prior to the commencement of the suit.

We have no fault to find with the reasoning of the cases cited by the plaintiff under his sub-title

of "statute of limitations," but it has no possible application to the facts in this case.

The 2½ per cent commission under the evidence was authorized by the advisory committee, to which we will later refer. It was thereafter authorized by the unanimous vote of the board of trustees of the corporation and with the knowledge and approval of the plaintiff himself and was ratified annually at each annual meeting of the stockholders, which the plaintiff is shown to have attended throughout the history of the company. The plaintiff is in no position to question the running of the statute of limitations against a claim for money paid to the defendant as a part of his salary, with his knowledge, consent and approval.

On page 31 of plaintiff's brief, he quotes from 1st Pomeroy Remedies, section 28, where it is said that the statute of limitations will not run against the *cestui que trust* unless there has been an open denial or repudiation of the trust brought home to the knowledge of the *cestui que trust* which requires him to act as upon an asserted adverse title. Here the knowledge of the payment of this money by the company to Richardson as additional compensation for his services was brought home to the plaintiff and to the other stockholders and certainly would re-

quire him to act as upon an asserted adverse title within the meaning of Pomeroy. All of the cases cited under this sub-division by the plaintiff refer to facts entirely different from those involved in this transaction. If the beneficiary did not know of the misappropriation, he might forcibly contend that the statute of limitations would furnish no bar to his recovery, but where he knew all of the facts and acquiesced in them, he certainly is in no position to raise the question.

In passing upon the defendant's motion for a nonsuit at the conclusion of the plaintiff's testimony, the court said:

"In this case with relation to the payment of the 2½ per cent commission for the years 1912 to 1916, the plaintiff in this case knew all about it. He was secretary for a time and auditor for much of the time, and bookkeeper all the time, and I guess a member of the board of trustees all the time. He knew about this. The defendant in this case, Mr. Richardson, was a member of the board of trustees as was Mr. Denman, the plaintiff in this case. The cases which are cited here by the plaintiff, so far as endeavoring to establish a fiduciary relation between the defendant in this case and the plaintiff, have no application, and the corporation was fully advised as to this payment. The payment was inaugurated by a majority of the board of trustees, by the majority of the stockholders representing their

local committee, and this was known, as the plaintiff testified on oath, to all the members of the board. A report was made every year including the entire expenses of the office, $34,000 some years and $32,000 some other years, and similar sums other years, and then a supplemental report was presented in which detail was made with relation to all of these expenses, and attached to the report. It is stated that this supplemental report was not submitted to the local board, but that it was sent to the foreign stockholders. But this payment was sufficiently brought to the attention of the corporation that it was the duty of the corporation to bring an action to recover or to cease to approve these reports, as was shown was done. The payment of this amount, if wrongful, if unauthorized, meant of course that action must be commenced by some authorized party within the period of limitation, and the statute of limitation is three years. The plaintiff in this case has no greater right than would the corporation have. The corporation would have to bring this action within three years. The plaintiff in order to bring any action to which he may be entitled or to enforce any remedy which he may have, must bring the action within three years. So that all of the years prior to 1917 are eliminated or barred by reason of the statute of limitation, so far as the 2½ per cent commission is concerned." (Trans. pp. 125, 126.)

The court further said:

"The plaintiff in this case is estopped from claiming anything under the Miller shares of stock so far

as the 5 per cent commission is concerned; and if Miller became a party to this action prior to the period of limitation with reference to any of the 2½ per cent years of course those may be pleaded by the plaintiff. I do not think that the plaintiff's right of action is barred as to the years 1917 and 1918, and if Mr. Miller comes into this case within three years after any of those years then his action may stand likewise." (Trans. pp. 126, 127.)

The court was clearly right in granting a non-suit as to all claims for commissions prior to and including the year 1916. The remaining portion of the 2½ per cent commission claim was submitted to the jury and a verdict was rendered in favor of the defendant, so that we are only concerned with the action of the court in granting the non-suit as to the 2½ per cent commissions for the years 1912 to 1916, inclusive. Whether the court construes this action as one in euqity or at law, the plaintiff is certainly estopped from asserting that the statute of limitations did not run against this portion of his claim.

CHARLES A. MILLER STOCK

Consisting of 798 Shares

The first complaint filed in the Superior Court of Pierce County, Washington, on the 29th of July, 1919, stated that Charles A. Miller was the owner of 798 shares of the capital stock of the Pacific Cold Storage Company on that date. The seventh amended complaint shows that Miller was the owner of this stock for many years prior to the commencement of this action. On the 31st of May, 1918, Miller was a member of the board of trustees. At a meeting of the board of trustees on January 7, 1919, Miller was present and voted in favor of a resolution fixing Richardson's compensation at 5 per cent for his services in liquidating the business of the Pacific Cold Storage Company. In fact, Miller seconded adoption of the resolution adopted at a meeting of the board of trustees fixing the defendant's compensation at 5 per cent upon the amount returned to the stockholders. (Minute Book of Pacific Cold Storage Company, Plaintiff's Exhibit No. 1, p. 305.) It was alleged in the sixth paragraph of defendant's amended answer to the

seventh amended complaint that the said resolution "was offered at said meeting by Harold Seddon, who moved its adoption, which was seconded by Charles A. Miller, the owner at that time of 798 shares of the capital stock of the company, being the same Charles A. Miller named in paragraph II of the second and fourth causes of action." (Trans. p. 85.)

The reply of the plaintiff admits that the said Charles A. Miller voted in favor of said resolution. The seventh amended complaint refers to Exhibit "A," attached to the complaint, which purports to be an assignment by Charles A. Miller to the plaintiff dated the 10th of September, 1919 (plaintiff's Exhibit No. 18). The plaintiff never acquired any interest in the Miller shares of stock until September 10, 1919. Miller was the owner of said shares on January 7, 1919, the date of the adoption of the resolution fixing the defendant's compensation for the winding up and liquidation of the affairs of the Pacific Cold Storage Company.

Such was the condition of the record when the plaintiff rested his case, and such was the condition of the record at the time defendant made his motion for non-suit as to the plaintiff's cause of action asserting his right to a pro rata share of the 5 per

cent commission paid by the company to the defendant by way of compensation for his services in the liquidation of the company. The answer of the defendant pleaded that the plaintiff was estopped to claim anything on account of the Miller shares for such 5 per cent commission paid to the defendant for his liquidating services. In granting the motion for non-suit as to the Miller claim, the court said:

"As to Miller and with relation to the resolution, the adoption of which he moved: He is estopped,—the resolution estops him from now questioning it in this proceeding. If he had an equitable right to have that set aside that should have been done, but he could not do it in this proceeding. The equity and legal remedies may not be blended in the federal court. That is primary doctrine. The plaintiff in this case is estopped from claiming anything under the Miller shares of stock so far as the 5 per cent commission is concerned." (Trans. p. 126.)

And in advising the jury as to the granting of the non-suit, said:

"For, your information, I will state that last night after you and before we adjourned, I sustained the motion in this case made on the part of the defendant to eliminate from this case all of the claims for 2½ per cent commission that were paid prior to January, 1917, and also to eliminate from the case the 5 per cent commission claimed on ac-

count of the stock held by Miller. He having moved the adoption of the resolution which authorized the payment of the 5 per cent, and the plaintiff in this case, Mr. Denman, knew of that when he acquired that stock and Mr. Miller would be estopped to now come in in this legal proceeding and that he should recover the 5 per cent which he helped authorize to pay." (Trans. p. 130.)

And in further commenting to the jury, the court said:

"I think I might say for the benefit of the record that this case was commenced as a law action, insisted upon by the plaintiff as a law action throughout the entire litigation; that the objections urged by the defendant are matters which pertain to equitable actions. In the Federal court a party may not commingle legal and equitable remedies. If the plaintiff has any relief, equitable relief, that might be urged, it must be done in an equitable proceeding, and this is not such a proceeding and has been constantly insisted upon by the plaintiff as a law action and this case has proceeded as a law action, and equitable rights, if there are any, may not be urged in a law action." (Trans. p. 133.)

The action of the court in granting the non-suit as to the right of the plaintiff as the assignee of Miller, to recover on any part of the 5 per cent commission was clearly correct. Miller could not in good conscience be permitted to recover back from

Richardson the compensation which he had, by moving the adoption of the resolution, caused the corporation to pay to the defendant for his services by way of compensation. The resolution expressly sets forth all of the facts connected with the fixing of the compensation and recites that the compensation was reasonable and just and was proper for the corporation to pay. Miller voted for this resolution. The plaintiff purchased his stock with full knowledge that Miller had voted to pay a 5 per cent compensation to Richardson for his services in liquidating the company. The plaintiff testified (Trans. p. 117), that Miller had advised him before he bought the stock as to the fact that he had voted in favor of the adoption of the resolution fixing Mr. Richardson's compensation at 5 per cent.

Moreover, if the court construes this action to be an equitable one, then under Equity Rule 94 and under the decisions above quoted, the plaintiff could not maintain any action of this kind unless the plaintiff was the owner of the stock at the time of the commission of the wrong complained of. We think it is an action in equity and not at law and if we are correct in this assumption, then the plaintiff could not recover in this cause of action for the reason that it is shown affirmatively by his own

testimony that he was not the owner of the stock at the time the misappropriations took place, if there were any misappropriations. But in any event, it must be apparent that Miller could not recover and the plaintiff who acquired the Miller stock with full knowledge of the facts is in no better position than Miller would have been. Moreover, the record shows that Miller was present at the stockholders' meeting on the 31st of May, 1918, and was elected a member of the board of trustees for the ensuing year and was present at the trustees' meeting held immediately after the adjournment of the stockholders' meeting. The evidence establishes the fact that at this meeting of the trustees held on the 31st of May, 1918, the board of trustees fixed Richardson's compensation for winding up the affairs of the corporation at 5 per cent upon the amount returned to the stockholders, and later in the summer of 1918, after the receipt of the telegram from the advisory committee in Scotland, the board of trustees again approved the payment of the 5 per cent commission and again reiterated its action of May 31, 1918; and later, on January 7, 1919, again set forth all of the facts and again approved the action of the board of trustees in fixing the defendant's compensation at 5 per cent, and Miller

voted in favor of this resolution which recited that the amount was just and reasonable for the services to be rendered. It is difficult to see what other action the court could have taken as to the right of the Miller stock to participate in any recovery on account of the 5 per cent commission. There was no error in the action of the court in granting the defendant's motion for non-suit as to this item.

ADVISORY BOARD

On page 37 of plaintiff's brief, it is contended that the advisory board had no legal existence. Counsel quotes the statutes of the State of Washington relative to the organization of corporations and cites the case of *Murray v. MacDougall & Southwick Co.*, 88 Wash. 358, as authority for the contention that the affairs of a corporation are to be managed by the board of trustees. We do not contend that the control of the affairs of a corporation is not usually vested in the board of trustees—in fact, we think it is. However, the board of trustees and stockholders have the right to approve the organization of an advisory board among the stockholders. The evidence shows that 85 to 90 per cent

of the stock of the Pacific Cold Storage Company was held in Great Britain. Mr. Richardson stated that about the year 1901 or 1902, he visited Great Britain and advised the stockholders residing there that he was unwilling to assume the sole responsibility for the company and suggested at a stockholders' meeting there that they should appoint a committee to work in harmony with the board of trustees in the State of Washington; that the advisory board was created; that it organized and appointed first J. A. Mitchell as its secretary and subsequently appointed David Inglis as secretary. (Trans. p. 136.) The defendant further testified:

"I suppose I have written thousands of letters. I made an annual report every year to the advisory board in detail and sent them the accountant's reports made by Mr. Denman and Mr. Moorhouse, which were on file in Glasgow and remittances were made to them and they circularized the other stockholders and most generally sent them the checks. In other words we obeyed their instructions throughout the entire history of the company." (Trans. p. 137.)

He further stated that every year a report was made and filed in Glasgow, Scotland, and the stockholders were circularized as to what had been done regarding the dividends and were always consulted to determine what dividends should be paid; that

such reports were addressed to the board of trustees and to him as president; that as soon as the report of the accountant, Mr. Moorhouse came in and he had received from Mr. Denman his detailed statement, which consisted of a statement of the salaries, amount of salary paid to various employees of the company and the operation of the steamers and in fact all the little details that were not stated in the report by the certified public accountant, and in addendum that was attached to the accountant's report and as soon as he received these two, he sat down and wrote from 10 to 15 or 20 pages to the advisory board stating what had been done during the year, if there had been a loss at this point or the other, and all of the details of the affairs of the company; that these reports were filed every year and were sent over to the advisory committee with the statement of Mr. Denman and Mr. Moorhouse for the information of the stockholders. (Trans. p. 138.) He further stated that these reports of Mr. Denman and Mr. Moorhouse showing the payment of the 2½ per cent commission were brought before the stockholders' meeting and later before the board of trustees; that after such reports of the accountants had been sent to the advisory board and a reply received, he would call a meeting of the

board and the reports of the accountants and the suggestions of the advisory board were brought before the regular trustees' meeting and were always approved by the board of trustees and generally approved at the stockholders' meeting. (Trans. p. 139.) That the reports containing reference to the 2½ per cent commission were always brought to the attention of the board of trustees and approved without a dissenting voice. (Trans. p. 139.)

Defendant offered in evidence Exhibits 2-A to 14-A, inclusive, and Exhibit 23-A, all being reports of the accountant, with the supplemental report prepared by Mr. Denman attached to each one showing the payment to Richardson of 2½ per cent commission in addition to his salary of $1,000 per month. These reports were all unanimously approved at the annual meeting of the stockholders for the year 1912 down to and including the year 1918. The plaintiff was a member of the board of trustees for a portion of the time and voted, approving these annual reports as to the 2½ per cent commission. The action of the advisory board approving this payment of 2½ per cent commission was merely advisory and it was approved and adopted by the board of trustees, the governing body of the corporation. The action in fixing this additional compensation

was authorized by the advisory board and it was approved and put into effect by the board of trustees and such action was approved by the stockholders at their annual meetings as shown by the testimony of Charles Richardson, Rufus Davis, A. W. Sterrett and B. A. Moore.

The jury certainly had sufficient evidence to justify the verdict that the action fixing the additional compensation of 2½ per cent was the act of the board of trustees of the corporation.

It is immaterial as to what the powers of the advisory board were as none of the recommendations of the advisory board were put into effect until approved by the board of trustees. This is clearly demonstrated by the approval of the annual reports prepared by the plaintiff, himself. We assume that this court will not be concerned as to the legal powers of the advisory board because the fixing of the 2½ per cent additional compensation to the defendant does not rest upon the action of the advisory board but upon the action of the board of trustees and of the stockholders. It is therefore apparent that counsel's criticism of the advisory board has no relevancy to the issues involved in this case.

CONSENT OF OTHER AMERICAN STOCKHOLDERS IMMATERIAL

Under this division, plaintiff, in his brief, page 41, contends that the approval of the 5 per cent commission by the American stockholders was immaterial—that the board of trustees alone could authorize the payment of this commission. The communication from the advisory board contained in the resolution of January 7, 1919, discloses that the payment of the 5 per cent commission was approved by all of the British stockholders. The evidence of Mr. Richardson is to the effect that all of the American stockholders with the exception of the plaintiff and Charles A. Miller in writing approved the fixing of the compensation of 5 per cent for the liquidation of the affairs of the company. Ninety-nine and sixty-four one hundredths per cent of the stockholders approved the agreement for the payment of the 5 per cent commission. (Trans. p. 146.) If all of the stockholders had approved the action in fixing this 5 per cent compensation for liquidation, according to the reasoning of counsel, such action would be immaterial as the board of trustees is the governing body of the corporation. Such

testimony is material as bearing upon the reasonableness of the compensation. We do not rely upon the fact that the 5 per cent commission was authorized by more than 99 per cent of the stockholders, however, for the reason that the payment of this commission was affirmatively authorized, before the services were performed, by the board of trustees of the corporation at its meeting on May 31, 1918, and at a later meeting in August, 1918, and at a later meeting on January 7, 1919, as hereinbefore stated.

On page 41 of plaintiff's brief, it is contended that the board of trustees could not delegate to the advisory board power to fix Mr. Richardson's compensation, either as to the 2½ per cent commission or as to the 5 per cent commission for the liquidation of the affairs of the company. The defendant does not contend that the advisory board necessarily had such power, nor does it necessarily rely upon the approval of this compensation by the advisory committee. It relies upon the affirmative action of the board of trustees as above stated. However, we do contend that the board of trustees could appoint the advisory board as its agent to fix the compensation of the officers of the company, but such action would always be subject to review by the board of

trustees under the decisions of the Supreme Court of Washington. Until the board of trustees disapproved the action of its agent, the advisory board, in fixing the compensation of an officer, the action of the agent would be binding upon the corporation. There is no proof that there was ever any disapproval of this compensation by any action of the board of trustees.

The testimony of Mr. Richardson, Mr. Davis and Mr. Moore establishes the fact that a resolution was adopted at the regular meeting of the board of trustees held on the 31st of May, 1918, although the same was not spread upon the minutes. (Testimony of B. A. Moore, Trans. p. 166; testimony of Rufus Davis, Trans. p. 184; testimony of Charles Richardson, Trans. p. 145.) And the same witnesses testified that the payment of the 5 per cent commission was approved at a meeting of the board of trustees held in August, 1918 (Trans. pp. 166, 167), and again on January 7, 1919, where the resolution was spread upon the minutes. The payment of this commission was therefore authorized by the affirmative action of the board of trustees of the corporation. The evidence introduced fully justified the jury in finding that such approval of the payment of the 5 per cent commission was made by the

board of trustees of the corporation at meetings of the board of trustees, duly and regularly called. This court will not set aside the verdict of the jury if there is any competent evidence to support the verdict, and there is an abundance of evidence to show that the fixing of the commission of 5 per cent for liquidation was approved and authorized by the board of trustees prior to the rendition of this service. However, the defendant is not compelled to rely upon such affirmative proof of the making of an express contract for the payment of this commission. The fact that such a contract was made is clearly established by the evidence and if it were not established by the evidence, still the defendant would be entitled to the commission upon the principle of a *quantum meruit.*

QUANTUM MERUIT

Article II of the by-laws of the company is as follows:

"ARTICLE II. DUTIES OF PRESIDENT.

"Section 1. It shall be the duty of the president to preside at all meetings of the directors and shareholders, and to sign, with the secretary, all bonds,

deeds, certificates of stock, promissory notes, or other instruments in writing, made or entered into by or on behalf of the company.

"Section 2. He may be removed from such office at any time by a majority of the board of trustees.

"Section 3. He may receive such remuneration as the board of directors may, from time to time, determine." (Plaintiffs' Exhibit No. 1, Minute Book, page 53.)

The foregoing is the only provision in the by-laws of the corporation defining the duties of the president. He is not even made the manager of the corporation. He is not given authority in the by-laws to make any contracts or to sell any property or to wind up the affairs of the corporation. His duties are merely to preside at the meetings of the trustees and stockholders and to sign contracts, deeds and bonds when authorized by the board of trustees. The by-laws also provide that the president shall receive such remuneration as the board of trustees may from time to time determine.

Under the management of the defendant, the corporation paid to its stockholders the sum of $1,300,-000 in dividends and returned in addition upon the liquidation of the company, the sum of $1,050,-000.00, after the payment of all expenses. The by-

laws, however, impose no special duties either upon the president or upon any director. Of course the board of directors, as a body is charged with the usual duty of the care of the affairs of the corporation. All of the duty and power cast upon them was as a board and not individually.

The Pacific Cold Storage Company was organized in the year 1900 and continued in business until it was dissolved on June 2, 1919. It had offices at Tacoma, Washington and branches at Fairbanks, Nome, Fort Gibbon, Dawson, Ruby, St. Michael, Iditarod, Alaska, Gleichen and Glasgow. It carried on operations throughout Alaska and in the province of Alberta. It owned ranches in Alberta and had, just prior to the commencement of the liquidation, about 5,000 head of cattle. It was engaged in the farming business and during the war raised annually from 15,000 to 20,000 bushels of wheat. It owned and operated steamers and cold storage plants in Alaska and in the State of Washington. Its business extended over the whole of the northern country. Its assets exceeded $1,000,000.00. The management of this property was carried on under the management of the board of trustees. The president was not charged with its management by the by-laws of the company. There is a vast differ-

ence between the management of a corporation and the sale of its assets, their conversion into money, the collection of the same and the distribution of the proceeds of the sale of its assets among its stockholders. It is plain that no president of a corporation has the power to sell its entire assets or to convert them into money and distribute the proceeds among the stockholders. The liquidation of a corporation is distinct from the management of its ordinary affairs.

The rule of law is practically universal that if services rendered by an officer of a corporation are outside of the general scope of his duties as such officer, he may recover upon a *quantum meruit*, even though his compensation for the performance of such services were not previously fixed by the board. It must be shown before a recovery can be had upon an implied promise:

"* * * not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or at least, that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them."

Construction Co. v. Fitzgerald, 137 U. S. 98.

As early as May 1, 1917, the evidence shows that the British stockholders, as well as the American stockholders were seriously considering the liquidation of the company. The liquidation had evidently been discussed by the board of trustees and by the advisory board and the matter of the compensation of the defendant for the liquidation of the company had been considered. In a letter written by the advisory board dated May 1, 1917 (Defendant's Exhibit No. 16), occurs the following:

"Regarding the cost of winding up, the advisory board do not anticipate that there will be any difficulty whatever in arranging same with you, but the question can not be disposed of summarily. They quite realize your position and they are sure that the shareholders here would wish to deal reasonably with you. From what experience the advisory board have had they rather think that a charge which a liquidator here would be allowed would be about 5 per cent (the sum you mention) on such of the fixed or permanent, as apart from liquid assets, as could not or would not be sold in the ordinary course of business. He would not, of course, have any salary, and he would only retain such of the managers and clerks so long as they were necessary for the carrying on of the business. Thereafter the winding up would be conducted by his own staff. In this case a good deal would depend upon the course which the liquidation takes and the sum of the salaries and office expenses requiring to be paid. You

might be good enough to write me further on this subject."

Again, on July 12, 1918, the defendant wrote to Mr. David Inglis in reference to his compensation (Defendant's Exhibit 18-A), and the advisory board answered this letter by wire, agreeing to the remuneration of 5 per cent suggested by the defendant in his letter of July 12, 1918. This was confirmed by a letter from Mr. David Inglis dated August 21, 1918. (Defendant's Exhibit 18-A.) The letter of May 1st was in answer to a letter of the defendant to Mr. Inglis dated March 30, 1917. (Defendant's Exhibit 15-A.) And on April 22, 1918, we find further correspondence on the same subject, all showing that the defendant as well as the corporation understood that the services of liquidation were separate and distinct from those of ordinary management and that the defendant should be paid a compensation of 5 per cent for the liquidation of the company, which was expected to take from one to three years. The services rendered by the defendant were certainly rendered under such circumstances as would lead a reasonable man to assume that they were to be paid for, and at a reasonable rate. These services are shown by the testimony to be valuable. Mr. Richardson, Mr. Moore and Mr.

Davis all testified that the liquidation was an extremely fortunate one and very much better for the stockholders than could have been realized at any time thereafter. (Trans. pp. 135, 161, 178, 195.)

L. R. Manning, Chester Thorne, Eugene Wilson and Ralph Stacy, all experienced business men, testified that the value of the services for liquidating the company would be approximately 10 per cent upon the amount returned to the stockholders. (Trans. pp. 175, 176, 177, 178, 195.) All of the work of liquidation was done under the immediate direction of the defendant. This is shown by the testimony of Mr. Richardson, and particularly by the testimony of Rufus Davis. (Trans. pp. 179, 185, 188.) Mr. Davis said (Trans. p. 188), that it was an exceedingly good liquidation.

"I do not think there has been a day since we started on that liquidation we could have gotten as much money for the assets as we got at that time. I think there was both energy and brains put into it, and that in addition to that, there was considerable good fortune coming our way."

He further said that Mr. Richardson put his time and usual energy into the matter of liquidating the assets and did his work as speedily as possible and got every cent there was in it; that the time at

which it was sold was a fortunate item and that the defendant selected that time. As to the nature of the services rendered by the defendant, we respectfully ask the court to read his testimony and the testimony of Rufus Davis. The services were valuable and they were rendered under such circumstances as to raise the fair presumption that both parties understood that they were to be compensated for. They were also rendered outside the scope of the duties of the president as fixed by the by-laws. The following authorities sustain our position:

"It is almost the universal rule that a director or officer rendering services outside the scope of his official duties may recover compensation therefor although not provided for by express contract if the circumstances are otherwise such as to raise an implied contract, and this rule seems entirely fair and proper. It puts directors, as to services rendered by them to the corporation, outside the scope of their official duties, in exactly the same position as any other stockholder, or for that matter, any person unconnected with the corporation who performs services which he is not bound to perform and which the corporation accepts under the circumstances which make it only just that it render compensation therefor."

Goodin v. Dixie Portland Cement Co., 1917F, L. R. A., page 319.

"A director of a corporation may recover services on quantum meruit from the latter for services rendered clearly outside his duties as a director."

Ruby Chief Mining Co. v. Prentice, 52 Pacific 210.

"Under the later and better reasoned cases for such services a recovery may be had either under an express or implied contract."

Stock Co. v. Toponce, 152 U. S. 405; 14 S. Ct. R. 633.

Brown v. Silver Mines, 30 Pacific 66.

"Neither the charter nor the by-laws of a corporation cast any special duties on a vice president or a director. The vice president is only required to act in the absence of the president and no special duties or management were in terms cast upon the president. It was provided that he preside at all meetings, sign all certificates of stock, contracts, checks, etc., 'and generally do and perform such other duties as are incidental to his office and not in conflict with its by-laws and articles of association.' No duty was cast on any individual director as such.

"The board of directors as a body is charged with the usual duty of care of the affairs of the corporation and all the power and duty cast upon them was upon them as a board and not individually. Obviously therefore, under the testimony which we have referred to from the plaintiff and the foreman of

the ranch, the services which the plaintiff performed were not those of a director or vice president, but outside thereof and similar to those of a general manager."

Corinne Mill Co. v. Toponce, 14 S. Ct. Rep. 633; 152 U. S. 405.

In the case of *Burns v. Commencement Bay Land Company*, 4 Wash. 566, the court stated that an officer or director was entitled to recover upon an implied contract for services rendered outside the scope of his employment and the court cites with approval the case of *Ten Eick v. Pontiac*, 74 Michigan 299, 16 A. S. R. 633, where an attorney who was a director and officer of a corporation was allowed to recover for his services as attorney. This case was to the same effect where the court says:

"A general creditor can defeat the allowance of preferred claims for labor performed by various stockholders in the capacity of employees within six months of the appointment of a receiver, by an objection to the validity of the stockholders' resolution fixing certain compensation for such stockholders, where there was sufficient evidence to sustain the finding that the resolution was never acted upon by the corporation and was waived by the stockholders and that they were regularly credited with the reasonable value of the services rendered by them and the conclusion of law that they were entitled to preferred claims was proper."

In the case of *Dial v. Inland Logging Co.*, 52 Wash. 85, the court cites with approval the case of *Brown v. Republican Mt. Silver Mines*, 30 Pacific 66, and approves the Burns case.

"An officer and stockholder only owning two shares of stock who is employed to work for the company is presumed to be entitled to reasonable wages which he may recover or offset upon showing the rendition and value of the services, and where a corporation made salaried payments to each of its officers from time to time, an officer devoting all of his time to the business as president and general manager is entitled to offset any balance due for wages at their reasonable value against the value of material sold to him by the corporation."

Argo Manufacturing Co. v. Parker, 52 Wash. 100.

In the case of *Blom x. Blom Codfish Co.*, 71 Wash. 41, the court held:

"Where a president and trustee of a corporation rendered services as a general manager with the consent of the other officers, he can recover on an implied contract for services as general manager without any express contract therefor."

The court further said:

"The rule relating to the allowance of reasonable compensation for services, performed for a corporation by a person who is also an officer of the corporation, when such services are rendered apart

from the duties incident to such office, is stated in 3 Clark and Marshall on Private Corporations, p. 2053, as follows:

" 'By the overwhelming weight of authority, the doctrine that the directors and other managing officers of a corporation are not entitled to compensation, in the absence of express provision or agreement therefor, does not apply to unusual or extraordinary services—that is, services which do not properly pertain to their office, and are rendered by them outside of their regular duties. If such services are rendered by a director or other officer at the request of the corporation or board of directors, with the understanding that they are to be paid for, the law will imply a promise, in the absence of any special agreement, to pay what they are reasonably worth.'

"Appellant contends that the evidence as to the alleged services for which the $8,000 was allowed falls far short of showing that they were outside of the line of his duty as an officer and director of the company. There is no evidence that the president or any of the members of the board of directors was bound to perform any duties in addition to those usually performed by like officers in similar corporations. Without attempting to enumerate the ordinary duties of such officers, it is sufficient to say that the services performed by defendant Wallace were largely in excess of those which he was bound to perform as an officer of the corporation. It appears from the testimony that Wallace spent a great deal of time and rendered valuable services to the company; that he saved the company's entire property from being sold under execu-

tion and under decrees to satisfy miners' and mechanics' liens; that he undertook the placing of the stock of the company; that he assumed the entire supervision of the tunnel work and disbursement of the funds, the employment of men, and the making of contracts. His services differed from the other officers of the company, in that he devoted almost his entire time for a portion of each year to the financing and management of the corporation affairs. He was put to much expense in railroad and traveling expense. He gave of his stock to others and secured their assistance, including the 3,750 shares presented to plaintiff. Obviously therefore, under the testimony, the services which the plaintiff performed were not those of a director or president, but outside thereof and similar to those of a general manager."

Gumaer v. Cripple Creek Co., 90 Pacific 85.

"The general manager of a corporation, who is also a director, has a legal claim for the value of his services although there has been no resolution of the board of directors or any express contract fixing his compensation, where he devotes his entire time to the business, and his duties are numerous and onerous, and not such as pertain to his office as director.

"In a suit to hold directors of a corporation liable for money paid to one of their number for services under a resolution invalid because passed at a meeting at which his presence was necessary to constitute a quorum, they should be credited with an

amount equal to what the services are reasonably worth."

Bassett v. Fairchild, 52 L. R. A. 611.

"It has been held that directors of corporations cannot, without previous express contract, receive compensation for such ordinary services as are usually rendered by directors without pay; for the common understanding, as declared by judicial decisions, is that such services are presumed to be rendered gratuitously. But that presumption does not apply to those onerous services performed by officers and agents of a corporation, though they be also directors, for which compensation is usually demanded and allowed, and which could not reasonably be expected to be performed for nothing."

Bassett v. Fairchild, 52 L. R. A. 615 (citing Constructing Co. v. Fitzgerald, 137 U. S. 98).

"A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But in any case, the mere fact that services are rendered for the benefit of a party does not make him liable upon an implied promise to pay them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an im-

plied promise, it must be shown not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for; or at least, that the circumstances were such that a reasonable man, in the same situation with the person who receives and is benefited by them, would and ought to understand that compensation was to be paid for them."

Bassett v. Fairchild, supra.

"Where the president of a corporation performs services outside of his official duties, the fact that he received no salary as president, and that there was no resolution of the board of directors containing an agreement to employ and compensate him for such extra services, was not conclusive evidence that he was to receive no pay, since a formal resolution was not essential to his recovery.

"Where the only duties of a president and director of a corporation were to preside at meetings and act as ex-officio member of committees, it was competent for the board of directors to employ him to perform services in procuring a lien to prevent foreclosure proceedings on corporate property and legal services in connection therewith, for which he was entitled to recover compensation, since as to such services he holds no trust relation towards the corporation."

Bagley v. Carthage Ry. Co., 58 N. E. 895.

"Neither is it essential to the plaintiff's right of recovery that he should have been employed under a formal resolution of the board. It is sufficient, if, from the nature of the employment, the importance of the subject-matter, and the action of the directors of the corporation, the inference is authorized of the employment as alleged.

"It is clear that there was a fair understanding with the creditors in the very beginning that Sackett should have $1,200 per year for his services outside of his official duties as director and secretary and treasurer. A binding contract for compensation for such services to one who is at the time an officer or director in the corporation may be made without any formal resolution. Whatever may have been said in prior cases, this is now the settled law of the state of New York and of the United States courts."

In re Gouverneur Pub. Co., 168 Fed. 115.

The United States Circuit Court of Appeals for the Ninth Circuit, in the case of *Montana Mining Co. v. Dunlap*, 196 Fed. 612, has expressly recognized the right of an officer of a company to recover reasonable compensation for his services even though there were no formal resolution or agreement for compensation fixed by the board of directors in advance and the court approves the language of the court in the case of *The National Loan Co. v. Rockland Co.*, 94 Fed. 335, as follows:

"But such officers who have rendered their services under an agreement, either express or implied, with the corporation, its owners or representatives, that they shall receive reasonable, but indefinite, compensation therefor, may recover as much as their services are worth; and it is not beyond the powers of the board of directors to fix and pay reasonable salaries to them after they have discharged the duties of their offices.

"A resolution adopted by the board of directors of a corporation reciting that an officer of the corporation had in the past performed certain services outside the scope of the duties of his office for which he was entitled to compensation is competent evidence in a subsequent suit by the officer to recover for such services as an admission of fact by the corporation, although the resolution was passed in an effort to compromise the claim."

Montana Mining Co. v. Dunlap, 196 Fed. 612.

"An officer or director of a corporation may recover fair and reasonable compensation for services rendered for the corporation outside the scope of his official duties, although there was no express contract therefor, if the services were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for.

Montana Mining Co. v. Dunlap, supra.

In the last named case the officer examined certain records in the main office and attended the

hearing before a coroner regarding the death caused by the negligence of the corporation.

"The director of a construction company who acts as superintendent, treasurer and general manager, performing, with the knowledge of the company, services not pertinent to his office as director can recover the reasonable worth of the services."

Fitzgerald v. Mallory Construction Co., 137 U. S. 98, 11 S. Ct. Rep. 36.

In that case the president went to the expense and trouble of procuring money for the company and acted as manager and superintendent and procured rights of way, superintending the doing of the work, hiring of the men and subletting of contracts, etc., which were matters not at all pertaining to his office as director.

Counsel for the plaintiff contends, in his brief page 49, and subsequent pages, that the board of trustees of the Pacific Cold Storage Company authorized the payment of the 5 per cent commission after the rendition of the services and that the fixing of this compensation of 5 per cent was in payment of services performed by the defendant which were within the ordinary scope of his duties as president of the corporation. This is not borne out by the evidence. The plan for the liquidation of the

company was practically agreed upon prior to the 1st of May, 1917, as shown in the letter of May 1, 1917, above referred to. The amount of the compensation is shown to have been considered. The board of trustees on the 31st of May, 1918, unanimously approved the payment of this compensation of 5 per cent. Prior to that time the steamer "Elihu Thompson" had been sold for $142,500.00, and certain other property had been sold to Waechter Bros. for $160,000. There was realized from the sale to Waechter Bros. a small amount in cash and about $90,000 in long time notes, which were afterwards negotiated by the corporation to the National Bank of Tacoma without recourse against the corporation, although Mr. Richardson guaranteed the payment of the notes personally. There was something like $150,000 cash realized from the sale to Waechter Bros. and of the "Thompson" prior to May 31st; the liquidation of the remaining assets aggregating in value more than $900,000, took place after the 31st of May, 1918, but the sale of the "Thompson" and the sale to Waechter Bros. was in pursuance of the plan outlined in the letter of May 1, 1917. The sale of these assets was clearly a part of the liquidation plan as was consummated on the 31st of May, 1918.

So that the board of trustees clearly authorized the payment of the 5 per cent commission prior to the liquidation of at least $900,000 of the assets of the corporation. This statement is supported by the testimony of Mr. Moore, Mr. Davis and Mr. Richardson and was sufficient to justify the jury in reaching the conclusion that the agreement for the payment of the 5 per cent commission was made prior to the rendition of the services. We will not prolong this brief by specific references to the testimony, but will ask the court to read upon this point, the entire testimony of Mr. Richardson, Mr. Davis and Mr. Moore.

The authorities cited by counsel under his subdivision "Back Pay Rule," plaintiff's brief, pages 49 to 78, are inapplicable in the light of the record. Counsel contends, page 51 of his brief:

"Directors of corporations can not recover for services rendered the corporation as other officers unless upon a contract or resolution passed by the corporation, or by a vote of the board of directors in which they take no part, or upon some provision made for such compensation, made in the charter or by-laws, all of which must be before such services are rendered."

The authorities cited by counsel do not sustain the contention. There is always an exception in

case the services rendered were outside the scope of the ordinary duties of the officer and the authorities which we have cited abundantly establish this exception. Moreover, the great weight of authority sustains the proposition that payment for the services may be recovered upon an implied promise if it be shown that the services were valuable and that they were "rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for, or at least that the circumstances were such that a reasonable man in the same situation with the person who receives and is benefited by them would and ought to understand that compensation was to be paid for them." (*Construction Co. v. Fitzgerald*, 137 U. S. 98; *Bassett v. Fairchild*, 52 L. R. A. 615.)

Counsel, brief page 54, cites the case of *Burns v. Commencement Bay*, 4 Wash. 558, in support of his position, but the court stated in that case that an officer or director was entitled to recover upon an implied contract for services rendered outside the scope of his employment. This doctrine was upheld by the Supreme Court of Washington in *Argo Mfg. Co. v. Parker*, 52 Wash. 100, and in the later case of *Blom v. Blom Codfish Co.*, 71 Wash. 41. In the Blom case the court held:

"Where a president and trustee of a corporation rendered services as a general manager with the consent of the other officers, he can recover on an implied contract for services as general manager without any express contract therefor."

Counsel, brief page 59, cites the case of *Wonderful Group Mining Co. v. Rand*, 111 Wash. 557, where the court held that there was a conspiracy on the part of the directors to vote themselves salaries for past services and that such action was based upon the fraud of the directors. In that case, however, it appears that the services were not rendered under such circumstances as would raise a presumption that the parties understood that they were to be paid for. In nearly all of the cases cited by counsel in support of his position, examination of the cases will disclose that the payment of back salaries was improper for the reason that the services were not rendered under such circumstances as would raise a presumption that the parties understood that they were to be paid for.

In this case we have shown that from May 1, 1917, onward, it was clearly understood by the board of trustees and by the advisory committee, as shown by the correspondence, that it was contemplated that the defendant should receive a compen-

sation of 5 per cent. The evidence shows that throughout the life of the corporation the recommendations of the advisory board were approved by the board of trustees of the company and the defendant had the right to rely upon the assumption that he was to liquidate the company and to receive compensation therefor.

We do not deem it necessary to analyze the cases cited by counsel in support of his "Back Pay" contention. They can all be distinguished upon the grounds that we have heretofore stated and as set forth in the case of *Construction Co. v. Fitzgerald*, 137 U. S. 98.

Counsel, brief page 78, contends that the plaintiff should have recovered on the first and second causes of action under the "Back Pay Rule" and he refers to the testimony of Mr. Denman that the 2½ per cent commission was paid under the authority of the advisory committee, but counsel overlooks the fact that this 2½ per cent commission was set up in the annual reports prepared by the certified accountants and in the addenda thereto prepared by the plaintiff and that these reports were approved by the board of trustees and by the stockholders annually. And he also overlooks the fact that at the meeting of the trustees immediately after the ad-

journment of the stockholders' meeting each year, the testimony discloses that the 2½ per cent commission was authorized before the services were rendered.

On page 79 of plaintiff's brief, it is contended that the court erred in refusing to give instruction No. 1 requested by the plaintiff. Counsel, however, fails to state his ground for the contention. Under the authorities cited by counsel for the plaintiff it is manifest that the instruction does not correctly state the law in the light of the evidence. In any even there was evidence sufficient to go to the jury as to the passage of a prior resolution and plaintiff himself, constantly, each year from 1912 to 1918, approved the payment of the 2½ per cent commission referred to in his requested instruction No. 1. In view of these circumstances, the giving of such instructoin would have been erroneous.

On page 80 of plaintiff's brief, it is asserted that the court committed error in permitting eight witnesses to testify as to the reasonable value of the services rendered by the defendant in liquidating the corporation. As we have heretofore shown, the services rendered by the defendant in the liquidation of the corporation were outside the scope of his duties as president of the corporation and that

under such circumstances it was entirely proper under the authorities cited, to admit such testimony.

On page 81 of plaintiff's brief, it is contended that the court erred in refusing to give the instruction set forth on said page. The evidence shows that on September 15, 1918, the company had on hand $237,000 in cash; that checks were sent out for the dividend declared at that time but that it took from twenty to thirty days before the checks that were sent to Great Britain were returned to the bank in Tacoma upon which they were drawn, and that the company expected to, and did convert into cash the other assets so as to make up the $500,000. The checks, however, were not paid until after the lapse of about thirty days, or sometime in the month of October. (Trans. 163.) The evidence as we have before shown clearly establishes the fact that the board of trustees authorized the payment of the 5 per cent commission on May 31, 1918, and again in August, 1918, before the services were rendered, and the evidence also shows that from May 1, 1917, both parties understood that these services of liquidation were to be performed by the defendant and that he was to be paid 5 per cent upon the amount returned to the stockholders.

(See letter of May 1, 1917, Defendant's Exhibit 16-A.) The instruction would have been improper in view of the evidence that had been admitted. The instruction was erroneous for another reason. The instruction requested the court to instruct the jury that the plaintiff was entitled to recover on both the third and fourth causes of action. As to the fourth cause of action, amounting to $1995.00, the claim is based upon the Charles A. Miller stock of 798 shares. Miller had voted in favor of the payment of the commission of 5 per cent on May 31, 1918, and had seconded a resolution approving its payment on January 7, 1919, at which time Miller was the owner of the stock. The plaintiff did not acquire the stock until after the passage of the resolution of January 7, 1919, and he bought it with full knowledge of the fact that Miller had seconded the resolution approving its payment and reciting that it was a reasonable compensation for the valuable services rendered by the defendant. The court committed no error in refusing to give such instruction.

On page 82 of plaintiff's brief, it is said that if it was legal for the defendant to receive a salary of $1,000 per month, it was illegal for him to receive additional compensation of 5 per cent. The

services for his salary covered the ordinary services of the president of the company. The commission covered services for the liquidating of the company, which were entirely distinct and apart from services rendered as president of the company. Under the authorities which we have cited the board of trustees had the right to pay additional compensation for such extraordinary services connected with the liquidation. But, even though no resolution had been adopted, there was an implied promise to pay the reasonable value of such services. They were rendered under such circumstances as would lead the defendant, as well as the corporation to understand that the services for liquidating the corporation were to be paid for.

On page 85 of plaintiff's brief, it is contended that the court erred in refusing to give the instruction set forth on said page requested by the plaintiff. The refusal to give such instruction was proper and it would have been an error to have given the instruction requested in view of the testimony that went to the jury that Miller was present at the meeting of the trustees held on May 31, 1918, and voted in favor of the payment of the 5 per cent commission. The instruction was erroneous for the further reason that Miller, the holder of the stock

on January 7, 1919, expressly approved the payment of the commission, both as to the distributions made prior to and subsequent to January 7, 1919, and the plaintiff bought the stock with this knowledge.

The plaintiff also complains on page 87 of his brief of the instructions given by the court. We ask the court to read the entire instructions given by the court. (Trans. 199-215.) The instructions clearly and correctly stated the law of the case to the jury and we think it would be useless to comment upon the instructions given by the court. Even if there were any error in such instructions given by the court, it was harmless error for the reason that the complaint did not state a cause of action and for the reasons hereinbefore stated. The plaintiff could acquire no greater rights as to any recovery upon the Miller stock than Miller had. Clearly Miller was estopped by his actions from claiming that the payment of the commission of 5 per cent was improper. He expressly recited in the resolution which was adopted on January 7, 1919, that the services were valuable and that the 5 per cent commission was reasonable and just.

On page 93 of plaintiff's brief it is urged that the court erred in not permitting the plaintiff to

show by Miller that he (Miller) did not know of the salary of $1,000 per month and did not know of the 2½ per cent commission that had been paid to the defendant for years and that he was taken by surprise when he seconded the resolution of January 7, 1919. The evidence shows that Miller had been a trustee for several months and had been a stockholder for years. The record shows that Miller attended stockholders' meetings at various times and was present when the accountant's reports and the addenda of Denman were submitted to the stockholders and approved by them. A stockholder is charged with the knowledge of what the books and records of the corporation show, and cannot be heard to say that he did not have such knowledge, especially in view of the fact that the evidence shows that Miller attended stockholders' meetings and was present when the accountant's reports were approved.

On page 99 of plaintiff's brief the contention is made that Moore, and Davis were interested parties and voted in favor of the resolution of January 7, 1919. We submit that the evidence does not show that they were in any wise interested in the result of the passage of such resolution approving the payment of the 5 per cent commission. Moreover,

the minutes of the meeting of January 7, 1919, show that Trustees Stacy, Miller, Seddon, Moore, Davis and Richardson were present and that the resolution was approved by all of the parties, including Miller. The fact that Moore and Davis were receiving a salary from the company and were to be paid for a part of their liquidating work by Richardson does not disclose such an interest in the passage of the resolution that would have any effect upon its legality.

On page 26 of plaintiff's brief and subsequent pages, it is contended that a majority of the board of trustees at the meeting of May 31, 1918, did not vote in favor of the payment of the commission of 5 per cent to the defendant. We call the court's attention to the meeting of May 31, 1918 (Minute Book, page 288). The minutes show that Charles Richardson, R. J. Davis, C. A. Miller and B. A. Moore were present. There were never at any time more than seven members of the board of trustees. Four members constituted a quorum and a majority of the quorum had the right to take such action as was deemed necessary in conducting the business of the company. On page 56 of the minute book, the by-laws expressly provide, "A majority of the board shall constitute a quorum for the transaction

of business." The meeting of May 31st, was therefore a legal meeting and the resolution approving the payment to the defendant of the commission of 5 per cent for the liquidation of the company was approved by a majority of the board.

CONCLUSION

Neither the Pacific Cold Storage Company nor its liquidating trustees were made parties to this action. They were indispensable parties. No demand or request was made upon the corporation or the liquidating trustees to institute this action against the defendant. There is no allegation in the complaint and no proof that any effort was ever made to induce the trustees of the company to bring the action. There is no allegation that such a demand would have been fruitless. There is no proof or allegation that the defendant dominated the affairs of the corporation or the liquidating trustees. The complaint fails to state the cause of action.

The plaintiff, as the owner of sixty shares of stock, had knowledge of the payment of the 2½ per cent commission to the defendant for many years prior to the bringing of the action. He voted

as a director in favor of its payment, and actually drew and signed checks in payment of the 2½ per cent commission on a number of occasions. The plaintiff, as the representative of the Miller stock, could acquire no greater rights than Miller had. Miller had knowledge of the payment of the 2½ per cent commission for years and is estopped to claim any portion of the 2½ per cent commission. As to the 5 per cent commission on the Miller stock he is estopped to claim any portion of the 5 per cent commission. The plaintiff stands in the same position. The action is barred by the statute of limitations. The proof clearly sustains the action of the court in granting the non-suit and likewise sustains the verdict rendered by the jury. The services rendered by the defendant in the liquidation of the company were duties outside of the scope of his duties as president. The services were rendered under such circumstances as would lead both parties to understand that the services were to be paid for. The amount of the commissions, both as to the 2½ per cent and the 5 per cent commission was authorized by the board of trustees of the company prior to the rendition of the services. There can be no question as to the value of the services. Eight or ten witnesses testified that the services were worth more than the amount paid to the defendant.

The services were valuable, the liquidation was successful, and by reason of the ability and efforts of the defendant the stockholders of the company received far more than they could possibly have received had the liquidation been made later and under different circumstances or at a time not determined upon by the defendant. The defendant stated at the time he was employed to liquidate the company that it might take one, two or three years of his time; that he would not engage in any other business until the liquidation was completed and would pay his own expenses of the liquidation other than the services of Davison and Moore. All of the stockholders, with the exception of the plaintiff, approved the payment of these commissions. It is true that the liquidation was completed with unusual rapidity, being consummated in something over a year after the commencement of the liquidation process. It might have taken years had it not been for the genius and ability of the defendant. If the time of liquidation had been extended for three years, the salary would have been comparatively little more than the defendant had been receiving for years, including the 2½ per cent commission. The compensation was not disproportionate to the value of the services, particularly when viewed in

the light of the successful winding up of its business. We do not think that the lower court committed any errors, either in his instructions or as to his rulings in the admission of testimony. It was stipulated between the parties that all correspondence and communications between the defendant and the Pacific Cold Storage Company and Davis Englis, the secretary of the advisory committee in Scotland, might be admitted in evidence without any objection except as to relevancy, competency and materiality. The stockholders at all times knew of the agreement for the payment of the commissions and the plaintiff and Miller knew of the agreement better than anyone else. Their means, knowledge and information were far better than those of any other stockholder. There is no evidence of any fraud or over-reaching upon the part of the defendant. Their entire transaction, with reference to the payment of commissions, was conducted openly and frankly, as shown by the letter of May 1, 1917, and by all of the subsequent correspondence.

The action is one in equity and it was the duty of the court to determine the facts. There is no evidence to sustain the contention that the plaintiff has been wronged in any way. The judgment of the lower court was abundantly supported by the testimony.

Under the authorities which we have cited and for the reasons heretofore set forth, we respectfully contend that the judgment of the lower court was correct and that the defendant is entitled to the judgment of this court affirming the action of the lower court.

Respectfully submitted,

KERR, McCORD & IVEY,
Attorneys for Defendant in Error.